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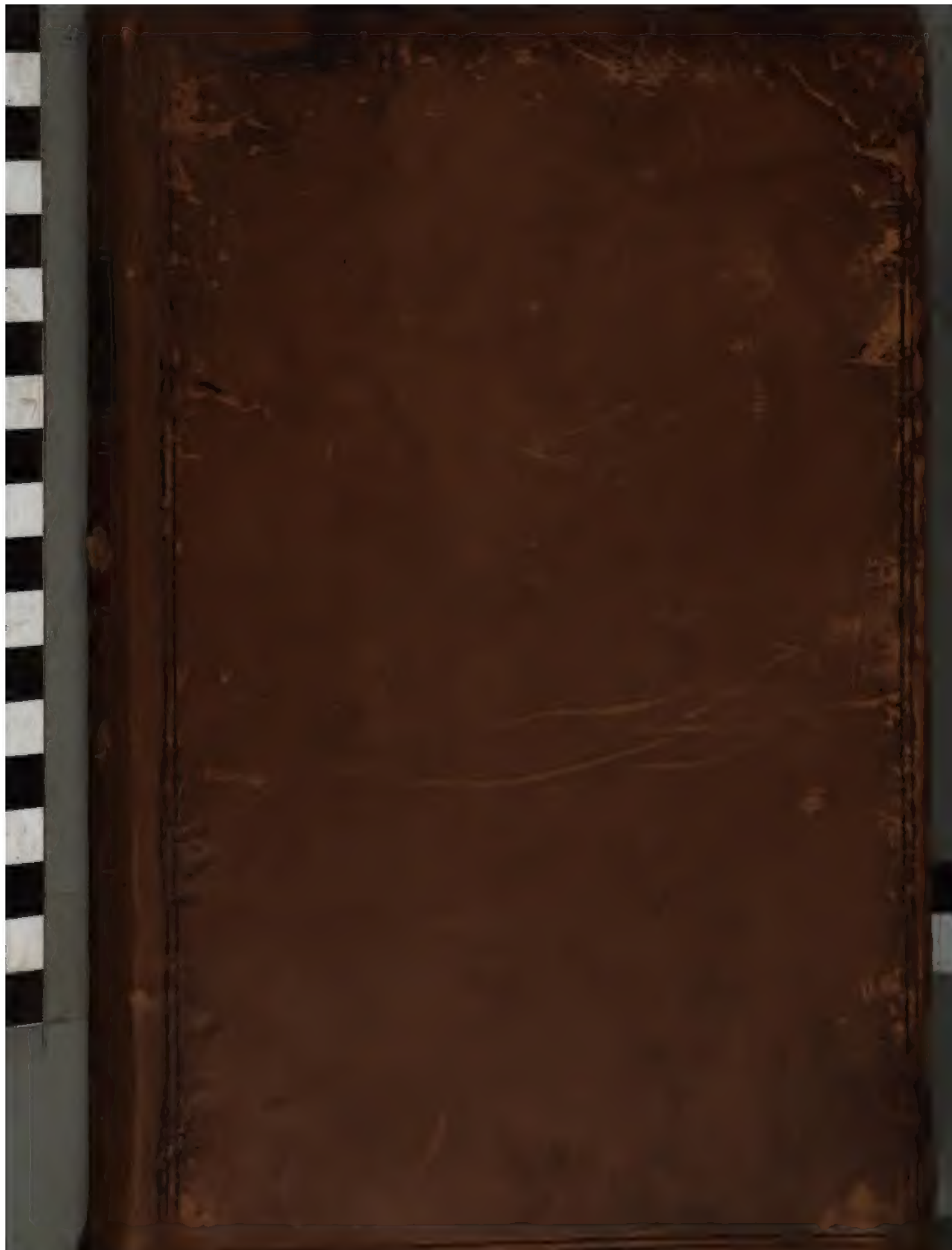
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PRACTICAL TREATISE

OF THE

LAWS RELATING TO THE CLERGY.

A

PRACTICAL TREATISE

OF THE

LAWS RELATING TO THE CLERGY.

By ARCHIBALD JOHN STEPHENS,

BARRISTER AT LAW.

IN TWO VOLUMES.

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GENERALLY.

1. GENERALLY. (1)

Absence of pews in ancient ecclesiastical edifices.

There seems to have been an entire absence in our cathedrals, and other ancient ecclesiastical edifices, of any fixed and regularly constructed accommodation for the laity, as an essential part of the building. Until about the period of the Reformation, no seats were allowed, nor any distinct apartment in the church assigned to distinct inhabitants, except for the lord of the franchise, or some other eminent persons. The general seats that were provided were moveable, and the property of the incumbent, and thence in all respects at his disposal; and they were frequently bequeathed by incumbents to their successors, or others as they thought fit. This is corroborated by the fact, that the common law books of an early period mention but two or three cases upon this subject, and those relating to the chancels and seats of distinguished persons. (2)

GENERAL RIGHT TO PEWS.

Judgment of Sir John Nicholl in *Fuller v. Lane*. The pews in a parish church are the common property of the parish.

2. GENERAL RIGHT TO PEWS.

In *Fuller v. Lane* (3) Sir John Nicholl observed, "By the general law, and of common right, all the pews in a parish church are the common property of the parish: they are for the use, in common, of the parishioners, who are all entitled to be seated orderly and conveniently, so as best to provide for the accommodation of all. The distribution of seats rests with the churchwardens as the officers, and subject to the control of the ordinary. Neither the minister, nor the vestry, have any right whatever to interfere with the churchwardens, in seating and arranging the parishioners, as often erroneously supposed: at the same time the advice of the minister, and

(1) *Vide* tit. CHURCHWARDENS — PARISH PROHIBITION.

(2) *Vide* Ken. Par. Ant. 596.
(3) 2 Add. 425.

even sometimes the opinions and wishes of the vestry, may be fitly invoked by the churchwardens, and to a certain extent, may be reasonably deferred to, in this matter. The general duty of the churchwardens is to look to the general accommodation of the parish, consulting, as far as may be, that of all its inhabitants. The parishioners, indeed, have a claim to be seated, according to their rank and station; but the churchwardens are not, in providing for this, to overlook the claims of all the parishioners to be seated, if sittings can be afforded them. Accordingly they are bound, in particular, not to accommodate the higher classes beyond their real wants, to the exclusion of their poorer neighbours; who are equally entitled to accommodation with the rest, though they are not entitled to equal accommodation, supposing the seats not to be all equally convenient." (1)

Upon a person quitting the parish, the right to use a seat in the body of the church, whatever was the nature and origin of that right, is at an end, because he has ceased to be a parishioner. (2)

When the number of parishioners increase, so that the seats are insufficient to accommodate all who apply for them, the parish is bound, and may be compelled by ecclesiastical censures, to provide against these inconveniences; and therefore, upon an application for a faculty to erect a gallery in the parish church, the Court will consider the grounds of the application, although it is alleged that a great majority of the inhabitants disapprove of it. For the Court may refuse the whole parish joined together, or may grant, if it appear necessary, a prayer, upon the application of one against all the rest. But though the Court is not bound by the wish of the majority, it will pay great attention to it; and the measure should be regularly submitted to the consideration of the vestry, in the first instance; and if it be then approved, though very few parishioners attend, they have the power of the parish delegated to them; and unless it be afterwards clearly established that a gallery is unnecessary, or that it is highly inexpedient, the Court will decree the faculty. (3)

But if more pews or galleries be necessary, it is said to be agreed, that the churchwardens alone cannot erect them: some say it cannot be done without the licence of the ordinary; and it is clear if there be a dispute, whether more pews are necessary, or where they shall be placed, the ordinary is the sole judge. But if the incumbent, churchwardens, and parishioners unanimously agree that more pews are necessary, and that they shall be fixed in such a place, it does not seem that there is any necessity for the ordinary's interposition, because where there is no controversy there can be no need of a judge. (4)

A possessory title to a pew is sufficient against a mere intruder. (5)

GENERAL
RIGHT TO
PEWS.

Judgment of
Sir John
Nicholl in
Fuller v. Lane.

Upon a person
quitting the
parish, his right
to a seat in the
church has
ceased.

GALLERIES.
When parish
bound to erect
galleries.

Churchwar-
dens cannot, per
se, erect gal-
leries.

Possessory
right valid
against an in-
truder.

3. PEWS GRANTED BY FACULTY, OR ACQUIRED BY PRESCRIPTION.

When the Court grants a faculty to appropriate a seat in a church to an inhabitant, it should be matter of preliminary consideration, 1. whether

PEWS GRANTED
BY FACULTY, OR
ACQUIRED BY
PRESCRIPTION.

(1) Vide etiam *Blake v. Usborne*, 3 Hagg. 733.

(2) *Fuller v. Lane*, 2 Add. 427. *Byerley v. Windus*, 5 B. & C. 18.

(3) *Groves v. Hornsey (Rector of)*, 1 Consist. 188.

(4) *Ayliffe's Parergon Juris*, 484

(5) *Spry v. Flood*, 2 Curt. 356.

PEWS GRANTED
BY FACULTY,
OR ACQUIRED
BY PRESCRIPTION.

What should be
matter of pre-
liminary con-
sideration to
the granting a
faculty.

Faculties ap-
propriating
pews not
issued, except
under special
circumstances.

If faculty be
obtained by
surprise, it will
be revoked.

Appropriation
of pews how
granted.

Judgment of
Sir John Nicholl
in *Fuller v.*
Lane.

such a grant would be prejudicial to the parish; 2. whether it would be prejudicial to the persons opposing the grant; and 3. whether the party applying for it is, from station and property in the parish, qualified to have such a grant. (1)

Ordinaries at the present day will not issue faculties appropriating pews to individuals, but under special circumstances (2): and if a faculty (for annexing a pew to a messuage) be obtained by surprise and undue contrivance, it may be revoked. (3)

In *Fuller v. Lane* (4) Sir John Nicholl observed, "Faculties appropriating certain pews to certain individuals in different forms, and with different limitations" . . . "have been granted in former times with too great facility, and by no means with due consideration and foresight. The appropriation has sometimes been to a man and his family, 'so long as they continue inhabitants of a certain house in the parish.' The more modern form is to a man and his family, 'so long as they continue inhabitants of the parish,' generally. The first of these is, perhaps, the least exceptionable form. It is unlikely that a family continuing in the occupation of the same house in the parish shall be in circumstances to render its occupation of the same pew in the church, very objectionable.

"The objection which applies to the other class of faculties is, that they often entitle parishioners to the exclusive occupancy of pews, of which they, themselves, are no longer in circumstances to be suitable occupants at all, whatever their ancestors might have been. A third sort of faculty, not unusual after churches had been new pewed, either wholly or in part, appears to have been, a faculty for the appropriation of certain pews to certain messuages, or farm houses; the probable origin (the faculties themselves being lost) of most of those prescriptive rights to particular pews, recognised, as such, at common law, the parties claiming which must show the annexation of the pews to the messuages, time out of mind; and the reparation from time to time of the particular pews, by the tenants of such houses or messuages, in order to make out their prescriptive titles. Some instances there are, too, of faculties at large; that is, appropriating pews to persons and their families, without any condition annexed of residence in the parish. But such faculties are so far at least, merely void, that no faculty is deemed either here or at common law good, to the extent of entitling any person who is a non-parishioner to a seat even, in the body of the church. As to an aisle or chancel, that indeed, may belong to a non-parishioner; for the case of an aisle or chancel depends upon, and is governed by, other considerations. But whenever the occupant of a pew in the body of the church ceases to be a parishioner, his right to the pew, howsoever founded, and how valid soever during his continuance in the parish, at once ceases and determines, though the contrary is very often supposed; as for instance, that he may sell, or assign it, or let it to rent, as part and parcel of his property in the parish. So again, of pews annexed by prescription to certain messuages, it is often erroneously conceived that the right to the pew may be severed from the occupancy of the messuage; it is no such thing, it cau-

(1) *Purtington v. Barnes* (Rector, &c. of),
2 Lee (Sir G.), 345.

(2) *Woolcombe v. Ouldrige*, 3 Add. .

(3) *Butt v. Jones*, 2 Hagg. 417.

(4) 2 Add. 426.

not be severed ; it passes with the messuage ; the tenant of which, for the time being, has also *de jure*, for the time being, the prescriptive right to the pew. The result, upon the whole, however, of these faculties is, that in many churches the parishioners at large are deprived, in a great degree, of suitable accommodation, by means of exclusive rights to pews, either actually vested in particular families by faculty or prescription, or at least, and which is the same thing as to any practical result, supposed to be so vested. I add this last, because, in many instances, these exclusive rights are merely suppositious, and would turn out, upon investigation, to be no rights at all. In this very case, for instance, there are two claims, as of right set up to this identical pew, neither of which, it now seems, is legally valid ; I mean Kelsey's asserted prescriptive right and that of Mr. Lane, derived through the Faringdon's, whose right itself was a mere possessory right, that actually ceased and determined upon Mr. James Faringdon ceasing to be a parishioner, in 1821.

PEWS GRANTED
BY FACULTY,
OR ACQUIRED
BY PRESCRIPTION.

Judgment of
Sir John
Nicholl in
Fuller v. Lane.

“ With this experience of the mischief that has resulted from a too lavish grant of these faculties in former times, it is the duty of the ordinary to prevent its recurrence, by proceeding in this whole matter with the utmost prudence and circumspection. It is especially, thus incumbent upon every ordinary looking to the times — with which he is bound to keep pace in all matters appertaining to his jurisdiction, so far as the same is compatible with his positive duties. Faculties of this sort might issue a century or two ago, without much, or without any, impropriety ; the issue of which, at the present day, would be in the highest degree improper. The population of the country throughout has immensely increased of late, and is still increasing. Dissent from the church too, especially among the lower classes, has also increased ; and partly, no doubt, from the lower classes being indifferently accommodated with church room, and even being precluded, in many instances from attending divine worship in their parish churches at all. It is to remedy this want of church room, which is much felt generally, that parliament has granted the vast sum of a million and a half, expressly for building new churches.”

The right to sit in a pew may be apportioned ; and therefore where, by a faculty, reciting “ that A. had applied to have a pew appropriated to him in the parish church in respect of his dwelling-house,” a pew was granted to him and his family for ever, and the owners and occupiers of the said dwelling-house ; and the dwelling-house was afterwards divided into two : — It was held, that the occupier of one of the two (constituting a very small part of the original messuage) had some right to the pew, and in virtue thereof might maintain an action against a wrong-doer (1) : Mr. Justice Taunton observing, “ The right of sitting in an allotted space of the church may be compared to a right of common of pasture, which may be apportioned. If a person seised of a messuage and forty acres of land, having a prescriptive right of common on a waste for all commonable cattle levant and couchant upon the messuage and forty acres, as to the said messuage and forty acres appertaining, make a feoffment to another of five acres of that land, the common is severable, because the prescription to have common on the land to which, &c., for the cattle levant and couchant

The right to sit
in a pew may
be apportioned.

Judgment of
Mr. Justice
Taunton in
Harris v.
Drewe.

(1) *Harris v. Drewe*, 2 B. & Ad. 164.

PEWS GRANTED
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on the land to which, &c., extends to the whole and every parcel. So in this case, by the faculty, the pew was granted to John Emery and his family for ever, and the occupiers of the messuage called The Lamb and Lark. The right, therefore, to use the pew attached to the occupier of every part and parcel of that messuage. Here, it having been proved that the plaintiff had taken a part of the ancient dwelling-house into the new one, some part of the right which appertained to the ancient dwelling-house also attached to the new one. The churchwardens were clearly wrongdoers. They were only the officers of the ordinary, and here the ordinary is precluded by the act of his predecessor."

A possessory title in a church seat has been sustained against an application for a faculty, by a person who had shown no title to it. (1)

Ordinary cannot grant a seat to one and his heirs.

The ordinary cannot grant a seat to one and his heirs, or to a person, in respect of a particular estate; for the seat does not belong to the person, but to the house, and is a privilege confined to inhabitancy, for otherwise, if the person left the town to dwell in another place, he would retain the seat, which is unreasonable. (2)

In *Stocks v. Booth* (3) Mr. Justice Buller said, he had seen a faculty for exchanging seats in a church, but still each was annexed to the house.

In *Langley v. Chute* (4) a prohibition was refused to a libel for the sole use of a pew, to which the churchwardens would have appointed another person than the person appointed by the ordinary, because, as observed by Chief Justice North, "the ordinary hath jurisdiction, and the churchwardens cannot jostle out his authority, when the privilege is claimed only for the defendant and his family;" and if the plaintiff be grieved by the sentence, he may appeal; for the common law courts can determine a point on the canon law, if the party have an appeal. (5)

Title of exclusive right to pews how acquired.

But both the ordinary and the churchwardens may be excluded from exercising any right to the disposal of a pew, where an individual has acquired an absolute and exclusive right therein. Still, to exclude the jurisdiction of the ordinary, it is necessary that the person claiming a pew should show a faculty or a prescription, which supposes a faculty time out of mind, the faculty itself being lost. (6)

By the common law there can be no property in pews

In *Hawkins v. Compeigne* (7) Sir John Nicholl said, that by the general law "there can be no property in pews—they are erected for the use of the parishioners. The ordinary may grant a pew to a particular person, while he resides within the parish—or there may be a prescription by which a faculty is presumed; but as to personal property in a pew, the law knows of no such thing."

Prescriptive rights to seats.

It has been held that the priority in the seat, as well as the seat itself, may be claimed by prescription, and that an action on the case lies for it at common law. (8)

Judgment of Sir John

In *Walter v. Gunner* (9) Sir John Nicholl observed, "A person claim-

(1) *Wilkinson v. Moss*, 2 Lee (Sir G.), 259.

(2) *Brabin v. Tradum*, Poph. 140. 2 Rol. Abr. *Prohibition* (G), 287. pl. 7. *Stocks v. Booth*, 1 T. R. 432.

(3) *Ibid.* 431.

(4) *Raym.* (Sir T.), 246.

(5) *May v. Gilbert*, 2 Bulst. 151.

(6) *Tattersall v. Knight*, 1 Phil. 237.

(7) 3 *Ibid.* 16.

(8) *Carleton v. Hutton*, Noy, 78. *Hutton's case*, Latch, 116.

(9) 1 *Consist.* 322.

ing a pew must show either a faculty or a prescription, which will suppose a faculty. But mere presumption is not sufficient, without some evidence on which a faculty may reasonably be presumed. The strongest evidence of that kind is the building and repairing time out of mind, for mere repairing for thirty or forty years will not exclude the ordinary." . . . "The possession must be ancient, and going beyond memory, though not the high legal memory." . . . "The time of sixty years has been held not sufficient against a wrong-doer. The law does not favour claims against the ordinary, and no ground is stated here, on which such a right can be established against him."

PEW'S GRANTED BY FACULTY, OR ACQUIRED BY PRESCRIPTION.

Nicholl in *Walter v. Gunner*.

"A prescriptive right must be clearly proved;—the facts must not be left equivocal,—and they must be such as are not inconsistent with the general right." (1)

Consideration for prescription

If a person prescribe that he and his ancestors, and all they whose estate he hath, in a certain messuage, have used to sit in a certain seat in the nave of the church for time out of mind, in consideration that they have used, time out of mind, to repair the said seat, and the ordinary remove him from this seat, a prohibition lieth; for this is a good prescription, and by intentment there may be a good consideration for the commencement of this prescription, although the place where the seat is be the freehold of the parson. (2) But if he prescribe generally, without the consideration of repairing the seat, the ordinary may displace him. (3)

A pew can only be annexed, by prescription, to a house; it cannot be to lands. Where so annexed to a house, the occupier of the house for the time being, is entitled to the use of the pew, not the owner of the estate; and a possessory right to a pew is only co-extensive in duration with actual possession, which last, if abandoned, the right itself wholly ceases and determines. (4)

A pew in the aisle of a church may be prescribed for as appurtenant to a house out of the parish. (5)

In *Lousley v. Hayward* (6) it was decided, that a pew in the body of a church may be prescribed for, as appurtenant to a house out of the parish. Chief Baron Macdonald observing, "The only question which the Court has to decide is, whether there can in law be a prescription for a person living out of the parish to have a pew in the nave of the church? There is, in the present case, an uninterrupted enjoyment; and although the origin of the right to the pew cannot be traced, it is undoubtedly ancient, notwithstanding there is nothing to show upon what circumstances it was at first assumed or grounded. And in the absence of all evidence against the right, the question is, whether, upon the mere principles of law, the Court can say, that, notwithstanding the enjoyment of the right in fact, it could never have had a legal origin?"

Pews in the aisle and in the body of the church appurtenant to houses out of the parish.

Judgment of Chief Baron Macdonald in *Lousley v. Hayward*.

"To defeat the claim of the plaintiff it must be shown, that the creation or assumption of the right was absolutely, and of necessity, void *in origine*; and unless the prescription is of itself rotten and bad, from some legal vice,

(1) *Per* Sir John Nicholl in *Pettman v. Bridger*, 1 Phil. 325.

(2) 2 Rol. Abr. *Prohibitio.* (G), 288. pl. 3. *Walter v. Gunner*, 1 Consist. 314. *Pettman v. Bridger*, 1 Phil. 325.

(3) *Ibid.* pl. 4.

(4) *Woollocombe v. Ouldridge*, 3 Add. 1.

(5) *Davis v. Wit, Forrest*, 14.

(6) 1 Y. & J. 583.

PEWS GRANTED
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Macdonald in
Loudley v.
Hayward.

there is nothing else to affect it. But as to the legal possibility or impossibility of the thing, a very short inquiry is sufficient. It appears from *Selden* (1), that in early times, by the pope's licence, churches were founded or built by lords of manors, or other lay founders; and that parishes were not then reduced to the exact circuits and boundaries by which they are now known, and particularly for ecclesiastical purposes; that when churches were first built, a certain district was allotted, over which the officiating minister was to superintend. (2) This was a kind of division, not a parish, in the sense in which we now understand it. The boundaries of parishes were settled long after the foundation of churches; and those ecclesiastical districts, formerly belonging to churches at their first institution, have been since much varied, and in many cases abridged and narrowed, when new churches were built. (3) How, then, can we now say that the owners of the house or the estate, in respect of which the pew is claimed, did not build or endow the church, or some part of it; or that this house, though now not within the parish, according to its present boundaries, was not formerly within the ecclesiastical limits of the church? Very probably it was so. But without going farther, it might have been so, and that is sufficient; for we are now only upon the question, whether a person can, for a house out of the parish, prescribe for a pew in the body of the church; or whether the prescription must of necessity be bad in law. The history of churches shows the contrary. A right to a pew can only exist by faculty or prescription. The distinction between a prescription in a house out of the parish, for a pew in an aisle but not in the body of the church, is merely made a doubt or question in some of the books; but there is no case in support of it, and there is no distinction in the reason of the thing itself."

But it has been subsequently held in *Fuller v. Lane* (4) and *Byerley v. Windus* (5), that a prescription for a seat in the body of the church, as appurtenant to a house out of the parish, cannot be supported. Where the prescription is interrupted, the jury are not bound to presume a faculty from long undisturbed possession. (6)

RENTING OR
PURCHASING
PEWS.

Every parishioner has a right to a seat in the church without payment.

4. RENTING OR PURCHASING PEWS.

Every parishioner has a right to a seat in the church without any payment, either as a purchase, or as rent for the same; and if necessary, occupiers of pews, who are not parishioners, having no prescriptive right therein, may be put out by the churchwardens to enable them to seat parishioners (7); and in *Wyllie v. Mott* (8), Sir John Nicholl said, "Seats in the church belong to the parish, for the use of the inhabitants, and by law cannot be sold nor let, without a special act of Parliament for the purpose."

(1) Vol. iii. pt. 2. p. 1121, 1122, edit. 1725.

(2) Ibid. 1120, 1206.

(3) Ibid. 1212, 1213.

(4) 2 Add. 425. *Ante*, 904.

(5) 5 B. & C. 1. *Post*, 909.

(6) *Morgan v. Curtis* (Sir L.), 3 M. & R. 389.

(7) *Walter v. Gunner*, 1 Consist. 314.

(8) 1 Hagg. 29.

In *Stevens v. Woodhouse* (1), on appeal from the Decanal Court of Wells, as to the grant of a faculty for the erection of seats, the judge of the Court of Arches observed:—"There is one clause in the faculty which is illegal—a permission to the parties erecting seats to sell the same. This is a practice which may have prevailed frequently; but whenever it had appeared before the Court, it has been constantly discountenanced." (The Court then referred to the following cases:—*The Churchwardens of Kensington v. Tryer* (2), "in which the churchwardens and vicar, in order to pay the expenses of new pews, had assigned pews to certain persons, their heirs, executors, &c., for sums specified. The Court held this to be illegal, and that the churchwardens might seat the parishioners in those pews, as if no such order had been made." In *Harford v. Jones* (3), "the vestry had granted, for 10*l.*, a pew to R. and his assigns, and appropriated it to such house as he should build. He assigned to Jones; and Jones then applied for a faculty; but the Court disallowed the claim of Jones to a pew, and ordered him to be placed in the common part of the church." In *Hole v. Burnet* (4), suit of perturbation, the party pleaded a purchase and a parochial custom for the sale. The Court rejected the libel, and held the custom illegal. In *Astley v. Biddle* (5), it appeared that Astley took a house, to which a pew had belonged forty years; the churchwardens demanded money for the use of the pew, and on refusal, they placed another person with him in the pew. The Court "admonished them not to disturb, and to desist from the practice of selling." Having stated these precedents, the Court further observed):—"These cases all show, that even where the order has been made to defray expenses, it has always been held illegal. It is said, however, that former cases had been instances of old pews, but that the agreement here is for building new pews. This cannot influence the Court, or make the act legal. It may be true, as it has been remarked in the argument, that this is frequently done, particularly in chapels. But they are private property; this is an old parish church; and I am of opinion that neither the parishioners by their consent, or the ordinary, or any power but the legislature, can deprive the inhabitants of a parish of their general right, and that such acts are contrary to the law of the land." The faculty was therefore pronounced illegal, and the sentence of the Court below reversed.

RENTING OR
PURCHASING
PEWS.

Faculties giving permission to parties who erect pews to sell them is illegal.

A non-parishioner, whether extra-parochial or residing in another parish, can have no right to a pew in the body of a parish church except by prescription. (6)

Non-parishioners have no right to pews, except by prescription.

And prohibition lies to restrain the Spiritual Court from proceeding in a suit brought by an extra-parochial person for a pew in the body of a parish church; also where a pew is claimed by any other title than prescription; or if it is claimed by that title, and the prescription is denied by the defendant. (7)

Thus in *Byerley v. Windus* (8) Mr. Justice Bayley observed, "The claim in question is by non-parishioners in respect of a messuage or messuages

Judgment of Mr. Justice Bayley in *Byerley v. Windus*.

(1) Arches, 25th Feb. 1792.

(2) Consist. 1721.

(3) Ibid. 1724.

(4) Ibid. 1740.

(5) Peculiars, 1774.

(6) *Byerley v. Windus*, 7 D. & R. 564. 5 B. & C. 1.

(7) See vide *Lousley v. Hayward*, 1 Y. & J. 583.

(8) 5 B. & C. 18.

RENTING OR
PURCHASING
PEWS.

Judgment of
Mr. Justice
Bayley in
*Byerley v.
Windus*.

out of the parish. It is true the claimants live in the messuages in respect of which they claim; that those messuages are in no parish, but are extra-parochial, and surrounded on all sides by the parish of St. Andrew; but what right can the inhabitant of an extra-parochial place have in the body of a parish church except by prescription? He contributes to none of the expenses of the church; they are borne exclusively by the parish. He contributes nothing to the maintenance of the minister, or other officers; they are supported exclusively by the parish. And to whom does the use and the enjoyment of the body of the church belong? To the parish and its inhabitants. The ordinary, indeed, has the right of disposing of the seats; but can he dispose of them to a non-parishioner? I apprehend not. Is not his right confined solely to resident parishioners? I take it to be clear that it is. Why is a faculty for a pew to a man and his heirs bad? Because it professes to give the right, whether the man and his heirs continue resident or not. (1) Why cannot a seat be claimed either by faculty or prescription as appurtenant to land? Because it is in respect of inhabitancy that it is to be used. (2) Why, if a man quits the parish, is his right to use a seat, whatever was the nature and origin of that right, at an end? Because he has ceased to be a parishioner. (3) Why, if a seat is appurtenant to a house, cannot the owner of the fee restrain his tenant from the use of it? Because the seat is for the benefit of the house, for the inhabitant of the house, not for the benefit of the owner if he cease to inhabit it. (4) Gibson in his Codex (5), under the head of Rules of Common Law concerning the Repairing and Ordering of Seats, says, 'Of common right, the soil and freehold of the church is the parson's, the use of the body of the church and the repair of it common to the parishioners, and the disposing of the seats therein the right of the ordinary. And generally, where the parishioners repair, the ordinary shall dispose. These heads are everywhere laid down in the cases on this subject, and have never been disputed.' In the case which was cited of *Pettman v. Bridger* (6), Sir John Nicholl states the rule to the same effect, but he restrains the right of the ordinary to a distribution among parishioners. 'By the general law and of common right,' he says, 'all pews belong to the parishioners at large for their use and accommodation, but the distribution of seats among them rests with the ordinary. The churchwardens are the officers of the ordinary; they are to place the parishioners according to their rank and station, but they are subject, upon complaint, to the control of the ordinary.' In *Fuller v. Lane* (7), in a very able and elaborate judgment, Sir John Nicholl lays down the same doctrine. 'By the general law, and of common right, all the pews in a parish church are the common property of the parish; they are for the use in common of the parishioners, who are all entitled to be seated, orderly and conveniently, so as best to provide for the accommodation of all;' and after laying down this as the general rule, he states, among other positions, 'that no faculty is deemed, either in the spiritual court or at common law, good, to the extent of entitling any per-

(1) Gibson's Codex, 221. *Hurkes v. Hurkes*, 1 Hagg. 321. *Fuller v. Lane*, 2 Add. 427.

(2) Gibson's Codex, 222. 1 Inst. 121. (b).

(3) Ibid. *Fuller v. Lane*, 2 Add. 427.

(4) *Macne v. Ewing*, 1 Hagg. 319.

(5) Tit. 9. c. 4.

(6) 1 Phil. 323.

(7) 2 Add. 425.

son who is a non-parishioner to a seat even in the body of the church.' Again; 'whenever the occupier of a pew in the body of the church, ceases to be a parishioner, his right to the pew, however founded, and how valid soever during his continuance in the parish, at once ceases and determines.' Again; 'Of pews annexed by prescription to certain messuages, it is often erroneously conceived that the right to the pew may be severed from the occupancy of the house: it is no such thing; it cannot be severed, it passes with the messuage, the tenant of which, for the time being, has also de jure, for the time being, the prescriptive right to the pew.' Lord Stowell lays down this last position in 1 Hagg. 319—321.; and in 1 Hagg. 194—314., Lord Stowell states that every housekeeper has a right to call upon the parish for a convenient seat; that if an inhabitant wants a pew, the churchwardens ought not to permit an occupancy by a non-inhabitant. They ought not in such a case to let to a non-inhabitant, nor permit prescriptive pews to be so let.' A distinction being thus established between parishioners and non-parishioners, can a distinction be also made among non-parishioners, between those who belong to another parish and those who do not? Upon what principle can such a distinction stand? The extra-parochials infringe equally upon the rights of the parishioners with those who belong to another parish. They are equally non-contributory to the expenses of the church. It is the fault of those under whom they claim that they have no parish. They have the advantage of being extra-parochial; they must take the disadvantages also. Upon authority, therefore, and upon principle, I am of opinion that extra-parochials cannot claim a pew in the body of a church otherwise than by prescription, if they could do so by prescription; and, consequently, that there could have been no possessory right in this case, without prescription.

RENTING OR
PURCHASING
PEWS.

Judgment of
Mr. Justice
Bayley in
*Byerley v.
Windus.*

"It was urged, however, upon the argument, that such possession as the principal and ancients had exercised, was sufficient to sustain a suit by them against a wrong-doer, and that *Byerley*, the plaintiff, was in this case to be deemed a wrong-doer; but a sufficient answer to that argument is, that *Byerley* personally is not charged to have given to the inn any interruption, and that it was the duty of the churchwardens, as officers of the ordinary, to secure the rights of the parishioners from the encroachment of strangers."

5. DISTRIBUTION OF PEWS.

DISTRIBUTION
OF PEWS.

The primary authority of appointing what person shall sit in each seat, being in the ordinary or bishop (1), he is to take care to order all things appertaining to divine service, so that there be no contention in the church, and that all things be done decently, and in order to give precedence to such as ought to have it. (2)

The ordinary
has the author-
ity to select
the occupiers of
pews.

And the churchwardens, as his officers, are to place the parishioners according to their rank and station (3); and hence it is, that if any seat,

Churchward-
ens to place

(1) 3 Inst. 202. *Ante*, 902, 903.

(3) *Fellman v. Bridger*, 1 Phil. 323.

(2) Watson's Clergyman's Law, 389. 2 Rol.
Abr. *Prohibition* (G), 288. pl. 1.

**DISTRIBUTION
OF PEWS.**

the parishioners according to their rank.

Rector entitled to the chief seat in the chancel.

Incumbent no authority in the seating and arranging the parishioners.

Proceedings against curate for altering a seat.

Authority of churchwardens to expel persons intruding into seats.

though affixed to the freehold, be taken away by a stranger, the churchwardens, and not the incumbent, must bring the action against the wrongdoer. (1)

The rector is entitled to the chief seat in the chancel, unless it be prescribed for by another. (2)

"The incumbent has no authority in the seating and arranging the parishioners, beyond that of an individual member of the vestry, and which his station and influence in the parish naturally give him. He may properly object to a plan which is generally inconvenient, which diminishes the accommodation in the church, which disfigures the building, which renders it dark and incommodious. In any case of this description, it is very proper he should make a representation to the ordinary; but as to the mere arrangement of seats, if the parishioners can settle that among themselves, and to their own satisfaction, and can agree about the expense, there seems but little necessity for the interference of the incumbent; the expense is that of the parishioners; the churchwardens are bound to repair, with the consent of the vestry: it is not the vicar, but the vestry which appropriates the seats, the general superintendence and authority in allotting them, rests with the ordinary (3):" thus, in *Parham v. Templar* (4) a proceeding was instituted against a curate for altering a seat in the body of the church without competent authority.

The churchwardens have a discretionary power subject to an appeal to the ordinary, to appropriate the pews in the church amongst the parishioners, and may remove persons intruding on seats already appropriated. Thus, in *Reynolds v. Monkton* (5), the plaintiff was the occupier of a house and farm in the parish of Longsutton, and claimed as such a right to sit in a particular pew in the parish church. On the other hand, the exclusive right to occupy that pew was claimed by one Gaylard, another inhabitant, for himself and family. The defendant was one of the churchwardens of the parish; and on the Sunday on which the assault complained of took place, just before divine service, he was informed by Gaylard that the plaintiff was in the pew and refused to leave it. The churchwardens had on previous occasions been appealed to, and had given the plaintiff notice that the pew belonged to the Gaylard family. The defendant, on being applied to by Gaylard, went in company with the other churchwarden to the pew, and desired the plaintiff to quit it, and go to another seat, which he refused to do; whereupon the defendant laid his hand on him with a view to force him out, when the plaintiff rose and walked out. The congregation were assembling, but the clergyman had not entered the church. There was contradictory evidence as to the violence used; and for the defendant it was attempted to establish a prescriptive right to the pew, as attached to the house in which Gaylard lived, his family having for a great number of years sat there; and it was also contended that, at all events, the churchwardens had a right to appropriate the seat, which had clearly been done in this case.

(1) Watson's Clergyman's Law, 389.

(2) *Spry v. Flook*, 2 Curt. 356.

(3) Per Sir John Nicholl in *Tattersall v. Knight*, 1 Phil. 233.

(4) 3 Ibid. 515.

(5) 2 M. & Rob. 384.

Mr. Baron Rolfe, in summing up to the jury, after stating that in his opinion the evidence failed to make out the prescription, observed, as to the other question,—“I think that the churchwardens have a right to exercise a reasonable discretion in directing where the congregation shall sit; and if the defendant used no unnecessary force, he had a right to remove the plaintiff from the pew in question to another seat. If, in the exercise of a fair discretion, the churchwardens thought it more convenient that the pew should be occupied by Gaylard’s family, and not by the plaintiff, and if the removal could be effected without public scandal, or the disturbance of divine service, the defendant was justified. You are to say whether any unnecessary violence was used.” The jury found a verdict for the plaintiff, damages 5*l*.

DISTRIBUTION
OF PEWS.

Judgment of
Mr. Baron
Rolfe in
Reynolds v.
Monkton.

In a suit for perturbation of seat, if it appear that the churchwardens have acted properly in displacing the plaintiff, the Court will dismiss them; but will not proceed to confirm the possession of the person seated by them, as it does not form part of the question before the Court, and may be injurious to the parish by taking the pew more out of the power of the churchwardens. (1)

In a suit for perturbation of seat, the Court will not confirm the possession of the occupant of the pew.

In *Groves v. Hornsey (Rector of)* (2) it was objected against building a gallery to accommodate parishioners who had applied for seats, that the churchwardens might put different families into the same pew, as the pews were not appropriated by any faculty, and would afford more sittings than were then occupied; but Sir William Scott said they might be appropriated by prescription, or by possessory right on allotment by the churchwardens, and a prescriptive title cannot be altered by any authority, nor a possessory title by the churchwardens alone, though it may be by the ordinary. And he intimated, that unless there was ample room, it would be improper to put individuals of different families in the same pews, which might produce contention and inconvenience. (3)

Possessory titles can be destroyed by the ordinary.

By custom, the churchwardens may have the ordering of the seats, as in London, and the like custom may exist in other places. (4)

Customs as to ordering pews by churchwardens: or churchwardens and parishioners.

So a custom time out of mind of disposing of seats by the churchwardens, and major part of the parish, or by twelve or any particular number of the parishioners, is a good custom, and if the ordinary interpose, a prohibition will be granted. (5)

But the churchwardens must show some particular reason why they are to order the seats exclusive of the ordinary; for a general allegation, that the parishioners have been accustomed to build and repair the seats, and that by reason thereof, the churchwardens have ordered and disposed of them, is not sufficient to take away the ordinary’s power. (6)

Churchwardens must show a reason if they order seats exclusive of the ordinary.

In *Spry v. Flood* (7) it was held, that stat. 51 Geo. 3. c. 151. s. 51., which enacts that the vestrymen (of St. Marylebone) shall set out and appropriate such a number of seats for the gratuitous accommodation of the poor of their parish for the time being, and also such a number of other pews

51 Geo. 3. c. 151. ss. 51 & 52. (L. & P.) Vestrymen of St. Mary-lebone, in the dis-

(1) *Wyllie v. Mott*, 1 Hag. 41.

(2) 1 Consist. 188.

(3) Vide etiam *Tattersall v. Knight*, 1 Phil. 232.

(4) Watson’s Clergyman’s Law, 389.

(5) Gibson’s Codex, 198. *Brabin v.*

Trediman, 2 Rol. 24. *Colebach v. Balldwyn*, 2 Lutw. 1032.

(6) Watson’s Clergyman’s Law, 389. *Presgrave v. Shrewsbury (Churchwardens of)*, 1 Salk. 167.; vide Gibson’s Codex, 198. *Brabin v. Trediman*, 2 Rol. 24.

(7) 2 Curt. 356.

DISTRIBUTION
OF PEWS.

tribution of
pews not sub-
ject to the ordi-
nary.

Vestrymen
power to re-
move the rector
from one of
two pews.

or seats for the use of the parishioners, as the vestrymen shall think necessary, proper, and convenient — is imperative upon the vestrymen, and empowers them to set out and appropriate the pews (other than those for the poor) without restriction, and not subject to the superintendence of the ordinary.

And that by the 52d section, which enacts it shall and may be lawful to and for the vestrymen, if they think proper to let the pews, &c. or any of them (save and except the pews or seats to be appropriated for the gratuitous accommodation of the poor of the parish for the time being) to such persons only who shall be inhabitant householders within the parish — the vestrymen were empowered to let all the pews save those for the poor, and consequently to remove the rector from one of two pews, of which he had been in possession from the time of his induction, and to let it to another inhabitant householder.

ERECTION AND
REPARATION OF
PEWS.

By whom
erected and re-
paired.

The onus and
beneficium go
together.

Judgment of
Lord Ellen-
borough in
*Price v. Little-
wood*.

Plea of repara-
tion.

6. ERECTION AND REPARATION OF PEWS.

The general charge of erecting seats in churches, and of keeping them in repair, lies upon the parishioners, unless they be relieved by any particular person being chargeable by prescription, to rebuild or repair the same. (1)

By the general law, the repairs of pews are to be done by the landowners of the parish or chapelry. (2)

If any repairs have been required within memory, they must be proved to have been made at the expense of the party setting up the prescriptive right. The onus and beneficium are supposed to go together. Mere occupancy does not prove the right; for though in country parishes the same families occupy the same pews for a long time, they still belong to the parish at large, unless the inhabitants of a particular house (not the owners of particular lands) have repaired the pew. What might be the effect of a very long occupancy, where no repairs have been necessary, seems undecided. (3)

In *Price v. Littlewood* (4) it was held, that an old entry in a vestry book signed by the churchwardens, stating that a pew had been repaired by A. in consideration of his using it, is evidence for a person claiming the pew under A.; Lord Ellenborough observing, "I think the entry is evidence in support of the plaintiff's claim. It shows the reputation of the parish upon the right; and, besides, it is made by the churchwardens upon a subject within the scope of their official authority."

The reparation of the pew by the person pleading such prescription, and praying a prohibition, must be alleged in pleading, because the ordinary, in the body of the church, *prima facie* has the right, and nothing but such private reparation can divest him of that right, notwithstanding possession and use time out of mind. (5)

But in *Pettman v. Bridger* (6), Sir John Nicholl thought the defendant's plea, that the pew had been, time immemorial, annexed to his house, was suffi-

(1) Degge's P. C. by Ellis, 210.

(2) *Per* Sir John Nicholl in *Hawkins v. Compaigne*, 3 Phil. 16.

(3) *Pettman v. Bridger*, 1 *ibid.* 325.

(4) 3 Camp. 288.

(5) *Woollocombe v. Ouldrige*, 3 Add. 6.

(6) 1 Phil. 327.

cient, according to the practice of the ecclesiastical courts; as it must be considered to include the averment, that the pew had been used, occupied, and repaired from time immemorial. (1)

ERECTION AND
REPARATION
OF PEWS.

In pleading a prescription to a pew, it need not be alleged that the party and his ancestors had always repaired it; the pew might never have required repair, and at the utmost it is only matter of evidence. (2)

It has been held, that in two cases reparation need not be particularly pleaded; first, in case of prescription for an aisle, because, by the common law, the particular persons are supposed to repair, and so need not show it; and the foundation of the right may be for other causes than repairing, as for being the founder, or having contributed to its building. The second case is, where an action upon the case is brought against one who disturbs another in his seat, which disturber being a stranger, and not having any *primâ facie* right, the possession of the other is a sufficient ground of action, and it need not be alleged that he repairs. (3)

Where repara-
tion need not
be particularly
pleaded.

Thus, in *Kenrick v. Taylor* (4), which was a special action upon the case, against the defendant for disturbing the plaintiff in his pew, which he claimed by prescription, as appurtenant to his messuage in the parish; Chief Justice Lee observed, "that this being a possessory action against a stranger, and a mere wrong-doer, the plaintiff was not obliged to prove any repairs done by himself or others whose estate he hath; for it is a rule in law, that one in possession need not show any title or consideration for such possession against a wrong-doer. But it is otherwise, where one claims a pew or an aisle in a church against the ordinary, who undoubtedly has *primâ facie* the disposal of all the seats in the church; and against him a title or consideration must be shown in the declaration and proved, as the building or repairing, &c. And this is the true distinction." (5)

One in posses-
sion, need not
show any title
or considera-
tion for such
possession
against a
wrong-doer.
Judgment of
Chief Justice
Lee in *Kenrick*
v. Taylor.

7. PROCEEDINGS AGAINST DISTURBERS OF PEWS.

PROCEEDINGS
AGAINST DIS-
TURBERS OF
PEWS.

The ecclesiastical jurisdiction does not extend to the trial of customs, or prescriptions; and, consequently, in all cases of prescriptions for seats, the matter is solely determinable at common law. (6)

SUITS WHERE
TRIABLE.

And in *Witcher v. Chesham* (7) a prohibition was awarded in a spiritual suit for a disturbance of a seat in a church, where it appeared that the temporal right was in question. The question being, whether an ancient house had been purchased with the seat belonging to it.

The Spiritual Court may proceed for a disturbance in a seat upon libels grounded on prescription, where the prescription is not denied, as in cases for a modus or a pension by prescription (8): and the reason why pro-

(1) *Vide* Rogers's Eccles. Law, 176.

(2) *Fiske v. Rowit*, Lofft, 423.

(3) Gibson's Codex, 197, 198. *Brabin v. Trediman*, 2 Rol. 24. *Buxton v. Bateman*, 1 Keb. 370. 1 Sid. 88. 1 Lev. 71. Raym. (Sir T.), 52. *Ashly v. Freckleton*, 3 Lev. 73.

(4) 1 Wils. 326.

(5) *Vide Pettman v. Bridger*, 1 Phil.

325. *Ashly v. Freckleton*, 3 Lev. 73. *Buxton v. Bateman*, 1 Sid. 203. *Woollocombe v. Ouldrige*, 3 Add. 6.

(6) *Vide post*, tit. PROHIBITION. Watson's Clergyman's Law, 390.

(7) 1 Wils. 17.

(8) *Jacob v. Dallow*, 2 Salk. 551. 2 Ld. Raym. 755.

PROCEEDINGS
AGAINST DIS-
TURBERS OF
PEWS.

When acti
cannot be
maintained.

The possessory
right to a pew,
is not analo-
gous to the
right which a
person has to
his house.
Judgment of
Chief Justice
Abbott in
Mainwaring v
Giles.

Trespass lies
for pulling
down pews
without autho-
rity.

hibitions have been granted, where customs or prescriptions have been denied, is stated (1) to be, "because the ecclesiastical law allows of different times in creating customs or prescriptions, and generally of less time than is allowed of by the common law, which owns no time in such case; but that whereof there is no memory of man to the contrary. Therefore, the common law will not suffer the spiritual courts to try prescriptions, whereby they might affect and charge persons' inheritances, by adjudging them to be good, which by the common law are no prescriptions."

Possession for above sixty years of a pew in a church is not a sufficient title to maintain an action on the case, for disturbance in the enjoyment of it; but the plaintiff must prove a prescriptive right, or a faculty, and should claim it in his declaration as appurtenant to a messuage in the parish. (2)

Upon a libel in the Consistorial Court for disturbance of the plaintiff's right to a pew, the Court adjudged the right to be in the plaintiff, and admonished the defendant not to sit in the pew; the Court of Arches reversed the sentence, but admonished the defendant not to use the pew again: these sentences were held not to be conclusive evidence of the plaintiff's right in an action for a disturbance between the same parties. (3)

An action at common law cannot be maintained for disturbing another in the possession or enjoyment of a pew, unless it be annexed to a house, or some other messuage in the parish. Thus, in *Mainwaring v. Giles* (4) Chief Justice Abbott observed, "In no case has a person a right to the possession of a pew analogous to the right which he has in his house or land; for trespass would lie for an injury to the latter, but for an intrusion into the former, the remedy, undoubtedly, is by an action on the case. That furnishes strong reason for thinking, that the action is maintainable only on the ground of the pew being annexed to the house as an easement; because, an action on the case is the proper form of remedy for the disturbance of the enjoyment of any easement annexed to land, as in the case of a right of way, or a stream of water." "I am of opinion, that this being a pew in the body of the church, and not in a chancel, which might be the freehold of an individual, no action at common law can be maintained for a disturbance, because the pew is not annexed to any house. The disturbance is matter for ecclesiastical censure only."

A person who has permission from the churchwardens to sit in a pew temporarily, and in order, by keeping possession for the future tenant, to carry into effect the conditions of sale of a house with which the pew had for above a century been held under an expired faculty, has no possession on which he can bring a suit for perturbation of seat against a mere intruder, such permission by the churchwardens being illegal as confirming the sale of the pew. (5)

If any person build a seat in the church without licence of the ordinary, or consent of the minister and churchwardens, or in any inconvenient place, or too high, it may be pulled down by order from the bishop, or his archdeacon, or by the churchwardens, or by the consent of the parson; but if any presume, with such authority, to cut or pull down any seat annexed

(1) Watson's Clergyman's Law, 593.

(2) *Sticks v. Booth*, 1 T. R. 428.

(3) *Cress v. Salter*, 3 ibid. 639.

(4) 5 B. & A. 356.

(5) *Blake v. Ussborne*, 3 Hagg. 726.

to the church, the parson may have an action of trespass against the misdoer, though he formerly set it up. (1)

In *Jarratt v. Steele* (2), Sir John Nicholl observed, "All persons ought to understand, that the sacred edifice of the church is under the protection of the ecclesiastical laws, as they are administered in these courts; that the possession of the church is in the minister and churchwardens; and that no person has a right to enter it when it is not open for divine service, except with their permission, and under their authority: that pews already erected cannot be pulled down without the consent of the minister and churchwardens, unless after cause shown by a faculty or licence from the ordinary. Here an individual, without any pretext or authority whatsoever, repeatedly breaks into the church by violence, pulls down the old seats, erects new ones, breaks a hole into the roof of the church, and thus descends into the chancel, after repeated admonitions from the minister to forbear.

"By giving an affirmative issue, however, he has shown that he has become convinced of his error and improper conduct; and on that account the Court is unwilling to proceed against him with rigour. I shall, therefore, only condemn him in the costs of the proceeding; admonish him to pull down the seats he has erected, and to replace those he has pulled down, and to reinstate the chancel as it was: and to do this I shall allow him till the first day of next term, when I shall expect him to certify that he has complied with this sentence."

A chapelwarden of a parochial chapelry has not, by virtue of his office, any authority to enter the chapel and remove the pews without the consent of the perpetual curate. (3) But the perpetual curate of an augmented parochial chapelry has a sufficient possession whereon to maintain trespass for breaking and entering the chapel and destroying the pews (4): — even against the chapelwarden. (5)

If any seats annexed to the church be pulled down, the property of the materials is in the parson, and he may make use of them if they were placed in the church by any one, of his own head, without legal authority; but for the seats erected by the parishioners, by good authority, it seems that the property of the materials, upon removal, is in the parishioners. (6)

A grant of part of the chancel of a church, by a lay impropriator, to A., his heirs and assigns, is not valid in law, and therefore such grantee, or those claiming under him, cannot maintain trespass for pulling down pews there erected. (7)

In *Rogers v. Brooks* (8) it was held, that possession for thirty-six years of a pew, claimed by plaintiff as appurtenant to a messuage, and acquiesced in by defendant, was good presumptive evidence of a faculty: Lord Mansfield observing, "The plaintiff's title to this pew is, that it has immemorially belonged to the house which he possessed. The defendant has set up a joint title in right of the house enjoyed by himself and another person. The plaintiff, in support of his claim, proved that he was put in possession of this pew by the rector and churchwardens thirty-six years ago. The

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AGAINST DIS-
TURBERS OF
PEWS.

Judgment of
Sir John
Nicholl in
*Jarratt v.
Steele*.

Pews can only
be pulled down
with consent of
minister and
churchwardens,
or licence from
the ordinary.

Chapelwarden
no right to
remove pews.

Perpetual
curate can
maintain tres-
pass for destroy-
ing pews.

If seats be
pulled down,
the property in
the materials
belongs either
to the parson
or parish.

Possession of
thirty-six
years good
presumptive
evidence of a
faculty.

Judgment of
Lord Mansfield
in *Rogers v.
Brooks*.

(1) Degge's P. C. by Ellis, 210. Wat-
son's Clergyman's Law, 393, 394.

(2) 3 Phil. 169.

(3) *Jones (Clerk) v. Ellis*, 2 Y. & J. 265.

(4) Ibid.

(5) Ibid.

(6) Degge's P. C. by Ellis, 213.

(7) *Clifford v. Wicks*, 1 B. & A. 498.

(8) 1 T. R. 491. n.

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question is, whether this act of the rector was to give possession under an old immemorial right, or in consequence of a new gift? There are strong reasons to induce us to suppose it was not a gift. They would not make a gift of that, which other people claimed. A gift cannot be made without a faculty, and there is none in this case. The Winxford family have acquiesced for thirty-six years, which is almost double the time which the Statute of Limitations requires as a bar in certain cases."

Uninterrupted possession of a pew in the chancel of a church for thirty years, is presumptive evidence of a prescriptive right to the pew in an action against a wrong-doer; but that presumption may be rebutted by proof, that the pew had no existence thirty years ago.

Judgment of
Mr. Justice
Buller in
Griffiths v.
Matthews.

Thus, in *Griffiths v. Matthews* (1) Mr. Justice Buller observed, "A seat in a church may be annexed to a house either by a faculty, or by prescription; and from long uninterrupted usage a faculty may be presumed. It is impossible to determine *à priori* what evidence will or will not be sufficient to support such a right: it must vary in each particular case. Evidence of continued possession since the year 1758, unanswered and unexplained, would have been sufficient to support the plaintiff's claim. But the case stood thus; there was evidence, whether weighty or not it is not necessary for us to decide, that those under whom the plaintiff claims had a seat belonging to their house in the body of the church; there was also some evidence that they used a seat in the chancel. If the case had rested on this only, it would have been a question of evidence for the determination of the jury: but it also appears, that prior to 1758, when this pew was erected, there was no pew at all in the chancel; and that the old open seat was occupied by different persons. If it had not appeared when or at whose expense this pew was built, or that it had not been a pew at all before 1758, possession from that time would have been sufficient evidence to have warranted the jury in presuming, that a faculty had been granted to the plaintiff's ancestor to build this pew in the chancel: but those circumstances were proved, and they destroyed the presumption."

In the ecclesi-
astical courts a
faculty will not
be presumed.

User does not seem to go so far in the ecclesiastical courts. In *Walter v. Gunner* (2) Sir William Scott says, "Mere presumption is not sufficient, without some evidence, on which a faculty may reasonably be presumed. The strongest evidence of that kind is, building and repairing, time out of mind: for mere repairing for thirty or forty years will not exclude the ordinary." And though a possessory right is sufficient to maintain a suit against a mere disturber, it is not as against the churchwardens and ordinary; though if the churchwardens causelessly displace persons in possession, the ordinary will replace them. (3)

COSTS.

On appeal in a pew cause from condemning churchwardens in costs, held, 1. that giving or refusing costs is not a matter absolutely unappealable; though such appeals, especially for trifling sums, are much to be discouraged. 2. That an appeal is preempted by doing any subsequent act in furtherance of the sentence, viz. attending taxation of costs. 3. That churchwardens were properly condemned in costs, when the party pro-

(1) 5 T. R. 298
(2) 1 Consist. 322.

(3) *Pettman v. Bridger*, 1 Phil. 316.

ceeded against in substance succeeded, and the suit was rendered necessary by their undue suppression of information. (1)

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8. PEWS IN NEW CHURCHES.

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By stat. 58 Geo. 3. c. 45. s. 62. the Church Building Commissioners may let pews and appropriate free seats.

Stat. 58 Geo. 3.
c. 45. s. 62.
Church Build-
ing Commis-
sioners may
let pews.

By stat. 58 Geo. 3. c. 45. ss. 63 & 64. the Church Building Commissioners can make orders as to the amount of rent to be reserved for each pew or seat in any such church or chapel; and the produce of such rents is to form a fund, out of which provision is to be made for the spiritual person appointed to serve the church or chapel, and for a clerk; and the commissioners can, with the consent of the bishop, assign a stipend to the clergyman out of the pew rents. (2).

Stat. 58 Geo. 3.
c. 45. ss. 63 &
64.
Application of
the produce of
pew rents.

By stat. 59 Geo. 3. c. 134. s. 26. the Church Building Commissioners can order and direct that the rents of the pews in any church or chapel built, acquired, or appropriated under the provisions of the act, or stat. 58 Geo. 3. c. 45. shall be assigned to the parish or district, and received by the churchwardens or chapelwardens of such parish or district, who shall thereupon be required to pay the stipend which from time to time may be assigned or fixed under the provisions of the former act to the minister and clerk: provided that the parish shall not in any such case be answerable to such minister or clerk for any greater sum in each year than the amount of the rent of the pews which shall have been actually let during the preceding year in any such church or chapel; and any surplus of pew rents remaining after payment of such stipend and other expenses shall, except in any of the cases therein mentioned, be invested in government securities in the name of trustees to be appointed by the bishop of the diocese, and suffered to accumulate for the purpose of forming a fund for the building or purchasing of a house, with the consent and approbation of the bishop, for the residence of the spiritual person serving the church or chapel, and after the completion of such purpose, then to the augmentation of the stipend of such spiritual person, or to the reduction of the pew rents, or the increase of the accommodation in any such church or chapel, in such manner as shall be directed by the bishop of the diocese for the time being.

Stat. 59 Geo. 3.
c. 134. s. 26.
Appropriation
of pew rents.

By stat. 8 & 9 Vict. c. 70. s. 11. where the church of such consolidated chapelry shall have been built wholly or in part by means of the funds placed by parliament at the disposal of the Church Building Commissioners, they can, with the consent of the bishop of the diocese, apply the provisions contained in stat. 58 Geo. 3. c. 45. and stat. 59 Geo. 3. c. 134. touching the reservation of pew rents, and the assignment thereof of a stipend to the minister and a salary to the clerk, to the church of any such consolidated chapelry, and to the incumbent and clerk thereof.

Stat. 8 & 9 Vict.
c. 70. s. 11.
Pew rents may
be fixed for the
minister and
clerk of any
consolidated
chapelry, if
money be
granted for its
erection.

By stat. 58 Geo. 3. c. 45. s. 75. before the consecration of any church or chapel under the provisions of the act, a seat or pew sufficient to hold six per-

Stat. 58 Geo. 3.
c. 45. s. 75.

(1) *Lloyd v. Poole*, 3 Hagg. 477.

ries, *vide etiam* stat. 59 Geo. 3. c. 134. s. 6.
ante 858.

(2) For pew rents in consolidated chapel-

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Pews to be provided for the minister, and free seats for the poor.

sons at least is to be set apart in the body or ground floor of the church or chapel, and contiguous or near to the pulpit, for the use of the minister of the church or chapel for the time being and his family; that other seats in some other convenient part of the church or chapel, not among the free seats, capable of containing not less than four persons, are also in like manner to be set apart for the use of the minister's servants; that pews, sittings, or benches in every such church or chapel, marked with the words "free seats," amounting in the whole to not less than one fifth part of the whole of the sittings in every such church or chapel, built, either wholly or in part, out of any rates, or with any money raised upon the credit of any rates of the parish or extra-parochial place, are also to be appropriated and set apart for the use of poor persons resorting thereto for ever; upon which pews so to be set apart for the minister, his family and servants, and the pews, sittings, or benches so appropriated for the use of the poor, no rent or assessment whatever is at any time to be charged or imposed.

Stat. 59 Geo. 3. c. 134. s. 30.

Pew to be provided for church or chapelwardens.

Stat. 58 Geo. 3. c. 45. s. 76.

Choice of pews.

By stat. 59 Geo. 3. c. 134. s. 30. proper pews are to be assigned and provided in every such church and chapel for the use of the church or chapelwardens thereof.

By stat. 58 Geo. 3. c. 45. s. 76. all subscribers, being parishioners, to any church or chapel built under the authority of that act, are to have the choice of pews at the rates fixed by the Church Building Commissioners, in the order of their amount of subscription; and subscribers of the same amount, in the order of their subscription.

Stat. 58 Geo. 3. c. 45. s. 77.

Pews to be let to pay the salaries of the minister, &c.

By stat. 58 Geo. 3. c. 45. s. 77. all the pews or seats in every such church or chapel (save and except the pews or seats particularly set down as free seats) are to be charged and chargeable with the several and respective yearly rents or sums set opposite to the figures or numbers marked upon each of the pews or seats, as they are particularly numbered and set down in a list or schedule to be made and signed by the Church Building Commissioners, and annexed to the deed of consecration of every such church or chapel; and which respective yearly rents or sums are to be paid by the possessors and occupiers of the pews or seats to the persons who may from time to time be appointed churchwardens of the church or chapel, by two equal half-yearly payments in each year, namely, on the Monday next after the nativity of our Saviour Christ, and the nativity of Saint John the Baptist, in the vestry room of the church or chapel, between the hours of nine in the forenoon and four in the afternoon.

Stat. 58 Geo. 3. c. 45. s. 78.

Churchwardens may, with consent of incumbent, &c. alter pew rents.

By stat. 58 Geo. 3. c. 45. s. 78. the churchwardens of any such church or chapel, at any time thereafter, with the consent in writing of the incumbent and of the patron of the church or chapel respectively for the time being, and of the bishop of the diocese, can alter any such yearly rent or sums; and in any such case a new list or schedule of rents or sums, and the pews or seats upon which the same are respectively charged, is to be signed by the churchwardens, incumbent, patron, and bishop respectively, and deposited with the deed of consecration of the church or chapel.

Stat. 59 Geo. 3. c. 134. s. 31.

Stat. 59 Geo. 3. c. 134. s. 31., after reciting that circumstances may arise in which it may become expedient and necessary to alter the rents at which pews may be let in any churches or chapels built or provided under that act, or stat. 58 Geo. 3. c. 45., enacts, that the churchwardens and chapelwardens of any such church or chapel are, when ordered and directed so to

do by the bishop of the diocese, with the consent of the patron and incumbent, and in any case in which the pew rents have been assigned to the parish, then with the consent of the vestry of the parish, to make such alteration in any such pew rents as shall be directed or approved of.

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By stat. 58 Geo. 3. c. 45. s. 79. every person possessed of a seat or pew in every church or chapel under the act, is to pay the rents charged thereon at two equal half-yearly payments, to wit, on the Monday next after the nativity of our Saviour Christ, and the nativity of Saint John the Baptist, in every year; and in case the rent of any such pew or seat, or any part thereof, happens to be behind and unpaid by the space of three months next after the same becomes due, and notice in writing demanding payment thereof has been given to the owner or occupier of such seat or pew, then the churchwardens for the time being of the church or chapel can either enter upon and hold such seat or pew, or let the same to any other person, in such manner as they think proper, until the rent so in arrear, and all costs and charges occasioned by the non-payment or in the recovery thereof, have been duly paid and satisfied; or otherwise to sell the pews or seats respectively by public auction to the best bidder, and out of the money thence arising to pay and satisfy the rent in arrear, rendering the overplus (if any), after deducting all reasonable costs and charges occasioned by or in consequence of such rent being in arrear and in the recovery thereof, to the owner or occupier of such pews or seats respectively (as the case may be); or the churchwardens, at their discretion, may sue for and recover the rent so in arrear by action of debt or upon the case, for the use and occupation of such pew or seat, to be brought against the owner or owners, or any occupier or occupiers thereof, in the name of "the churchwardens of the church or chapel of [describing the church or chapel];" and no such action or suit is to abate by reason of the death, removal, or going out of office of any churchwarden.

Stat. 58 Geo.
c. 45. s. 79.
Pew rents in
be recovered
half-yearly.

By stat. 59 Geo. 3. c. 134. s. 27. the surplus of pew rents remaining after payment of the stipends to the minister and clerk and other expenses is, in any case in which the Church Building Commissioners think it expedient, to be charged with and applied towards the payment of any sums of money which may be borrowed or advanced by way of loan at interest, or by way of annuity or otherwise, for or towards the building of any such church or chapel, or for the purchasing of any site for the same, and defraying all expenses relative thereto, and in keeping such church or chapel in repair; and the residue of such pew rents, if any, is to be paid and applied in manner therein-before directed, or in aid of the church rate to be raised in such parish, if the commissioners think fit; and the churchwardens or chapelwardens, with the consent of the commissioners, can borrow and take up at interest, or by way of annuity or otherwise, any sums of money for or towards the building such church or chapel, or purchasing such site, or defraying the expenses relative thereto, upon the credit of the pew rents, and by writing under their hands to charge the pew rents, subject to the stipend to the minister, and the other expenses therein mentioned, with the payment to any person of any such sums of money, with interest, or with any such annuity, in such manner as the churchwardens or chapelwardens may think fit.

Stat. 59 Geo.
c. 134. s. 27.
The surplus
pew rents, to
be disposed
of.

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Stat. 59 Geo. 3. c. 134. s. 32.
To whom pews may be let or sold, and rates to be payable in advance.

By stat. 59 Geo. 3. c. 134. s. 32. the churchwardens or chapelwardens of any additional church or chapel cannot let or sell any pews and seats to parishioners, except during the time such parishioners continue to be inhabitants of the parish; and every sale of any pew or seat is to be subject to such reserved rent as has been fixed under that act, or stat. 58 Geo. 3. c. 45., and is to be by private contract and not by public auction; and all pew rents under those acts are to be payable in advance; (that is to say,) one year's rent is to be paid on admission to the pew or seat, if such admission have been given at Lady Day or Michaelmas, or if at any intermediate period, then the proportion of the half year to Lady Day or Michaelmas, as the case may be, and a half year's rent over and above such proportion; and thereafter half-yearly payments are to be made in advance, commencing on the Lady Day or Michaelmas immediately following the taking of such pew; and every such pew and seat is to be forfeited and become vacant by the discontinuance of any such payment in advance for two following half years.

Stat. 59 Geo. 3. c. 134. s. 33.
Subscriptions in lieu of pew rents, and allowing subscribers to assign their interests.

By stat. 59 Geo. 3. c. 134. s. 33. the Church Building Commissioners can discharge any subscribers towards building any church or chapel, wholly or in part, from the payment of pew rents in the church or chapel, for a limited time or for life, in such proportion to the amount of their respective subscriptions as the Church Building Commissioners shall see fit, and to allow any such subscriber, if he remove from the parish, to assign the remainder of such term to any other parishioner inhabiting the parish. (1)

Stat. 3 Geo. 4. c. 72. s. 23.
Transfer of pew rights from existing churches to new churches.

By stat. 3 Geo. 4. c. 72. s. 23. the Church Building Commissioners can transfer any rights to any pews, with the consent of the owners thereof in any existing church or chapel, belonging to any persons residing in any division of any parish or place in which any new church or chapel has been or may be built, acquired, or appropriated under the provisions of stat. 58 Geo. 3. c. 45. & stat. 59 Geo. 3. c. 134., to the church or chapel of the division in which any such persons reside, for the purpose of enabling the commissioners to make or increase the number of free seats in the church or chapel from which such rights have been transferred; and the persons from whom any pews have been so taken, and to whom any pews in lieu of their former pews are assigned by the commissioners in any other church or chapel, are to enjoy the same respective rights and titles to the pews so assigned, as they respectively enjoyed in their former pews, or such right and title as may be directed and set forth in such assignment in lieu thereof, without any faculty, instrument, or other process than such assignment; and every such assignment is to be registered in the registry of the diocese in which the church or chapel may be, and a duplicate thereof deposited in the chest of the church or chapel in which any such pew may be so assigned; provided that no larger or greater or other right be given to any pew in any new church or chapel, upon any such transfer, than belonged to the owner, proprietor, or occupier of the pews in the existing church or chapel, in the pews in respect of which any such transfer has been made.

Stat. 3 Geo. 4. c. 72. s. 24.

By stat. 3 Geo. 4. c. 72. s. 24. (amended by stat. 8 & 9 Vict. c. 70.), in

(1) *Vide* stat. 1 & 2 Gul. 4. c. 38. s. 21.

every case in which rents have been fixed upon the pews in any church or chapel under stat. 58 Geo. 3. c. 45. & stat. 59 Geo. 3. c. 134. for the purposes therein specified, notice is to be given for six successive weeks at the end of each year, of all the pews which are vacant, or which will become vacant at the commencement of the then next year, by affixing the same in writing upon the doors of the church or chapel and vestry room thereof respectively; and all such pews as are not taken at the rent respectively fixed thereon within fourteen days after the commencement of the then ensuing year, are in every such case to be let to any inhabitant of any adjoining parishes or places in which there is not sufficient accommodation in the churches and chapels of the parish or place for the inhabitants thereof, at the rent respectively so affixed upon such pews, for any term not exceeding the end of the year; and at the expiration of the year, and also of every succeeding year in which any such pews are rented by inhabitants of any adjoining parishes, such pews are to be inserted in the list of vacant pews, to be taken in preference by the inhabitants of the parish or place to which the church or chapel belongs; and all such pews as may not be so taken by any inhabitant of the parish or place may again be let, and so on from year to year, to any inhabitants of any adjoining parish or place.

By stat. 3 Geo. 4. c. 72. s. 25. in case any inhabitant to whom any lease or demise of any pew, seat, or sitting, in church or chapel, of the parish or place or division or district of which he is an inhabitant, shall be granted for any longer term than one year, ceases to be an inhabitant of the parish, place, division, or district, or discontinues his or her attendance at the church or chapel for the space of any one year, then his, her, or their lease, demise, term, estate, and interest in such pew, seat, or sitting respectively, is, at the end or expiration of the then current year of such term or period, to cease and determine.

By stat. 5 Geo. 4. c. 103. s. 10. (1) every application to the bishop of the diocese under that act, must contain an offer to set apart such number or proportion of free seats as are required under stats. 58 Geo. 3. c. 45., 59 Geo. 3. c. 134., & 3 Geo. 4. c. 72., and also an offer to provide, out of the pew rents arising from the remaining part of the seats of such church or chapel, a competent salary for the spiritual person who may officiate therein, and for all other expenses incident to the performances of divine service, and for maintaining the church or chapel.

By stat. 1 & 2 Gul. 4. c. 38. s. 4. the pews or sittings in the church or chapel are to be let by the churchwardens or chapelwardens, or by some person appointed by the trustees, or person building and endowing the same, to act in that behalf, according to a scale of pew rents fixed by the trustees or such person, and approved of by the bishop, which scale the trustees, or such person, with consent of the bishop, can alter from time to time as occasion may require: provided that all such pews as are not taken at the rent respectively fixed thereon, within fourteen days after the commencement of the ensuing year, are in every such case to be let to any inhabitant of any adjoining parishes or places in which there is not sufficient accommodation in the churches and chapels of

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Regulation as to the letting of pews.

Stat. 3 Geo. 4. c. 72. s. 25.
Avoidance of pew leases.

Stat. 5 Geo. 4. c. 103. s. 10.

Stat. 1 & 2 Gul. 4. c. 38. s. 4.
Scale of pew rents fixed by trustees.

Scale may be altered.

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the parish or place for the inhabitants thereof, at the rent respectively so affixed upon such pews, for any term not exceeding the end of the then year; and at the expiration of the year, and also of every succeeding year, in which any such pews are rented by inhabitants of any adjoining parishes, such pews are to be inserted in the list of vacant pews, to be taken in preference by the inhabitants of the parish or place to which the church or chapel belongs; and all such pews as may not be so taken by any inhabitants of the parish or place may again be let, and so on from year to year, to any inhabitants of any adjoining parish or place.

Stat. 1 & 2 Gul. 4. c. 38. s. 22.
Accommodation in pews may be apportioned.

By stat. 1 & 2 Gul. 4. c. 38. s. 22. the Church Building Commissioners can, if they think fit, in all such cases as shall come before them, order and direct that such church or chapel shall be subject to all the provisions of that act, and of stats. 58 Geo. 3. c. 45., 59 Geo. 3. c. 134., 3 Geo. 4. c. 72., 5 Geo. 4. c. 103., & 7 & 8 Geo. 4. c. 72. as to apportionment of accommodation in pews and free sittings, and as to pew rents.

Stat. 58 Geo. 3. c. 45. s. 65.
Bishop may order a third service with a sermon.

By stat. 58 Geo. 3. c. 45. s. 65., in any parish or extra-parochial place in which it shall appear to the bishop of the diocese that the churches or chapels built under the provisions of the Church Building Acts, do not afford sufficient accommodation for the parishioners or inhabitants thereof to attend divine service, and that additional accommodation should be provided for such purpose, by the celebration, on Sundays and on the great festivals, of a third or additional divine service, being either the morning or evening service of the united Church of England and Ireland, with a third sermon, he can require the incumbent of every such parish, district parish, or extra-parochial place, to nominate to him a proper person to be licensed to serve as a curate for the performance of such additional or third service with a sermon, and if he do not within six months after such requisition, nominate such curate to be licensed, the bishop can nominate and license a proper curate for the purpose; and the bishop is empowered to require the churchwardens of every such church or chapel to let for the additional service such proportion of the pews of such church or chapel, not being a pew held by faculty or prescription, and at such rates, as in his opinion shall be sufficient to afford a competent salary to the curate; and the churchwardens are required so to let the same, and to raise and levy, in the manner directed by the act, the rents from the persons who may take the pews, reserving such number of sittings as free seats, as to the bishop shall appear expedient, not being less than one fourth: provided that if in any parish, district parish, or place, any number of persons represent to the bishop that they are willing to provide by subscription such an annual sum as may be sufficient to afford a competent salary to a curate "for the performance of such additional service with a sermon, or for the performance of such additional service with a third sermon," and if the bishop be of opinion that that mode of providing a salary for the curate is more expedient than the raising a salary by pew rents, he can require the incumbent of the church or chapel to nominate a curate to him, and in default to appoint a curate himself: provided that the curate so nominated and licensed for the performance of such third service be subject to all jurisdiction, laws, statutes, and provisions to which stipendiary curates are subject, except so far as relates to the amount of salary, and the

Pews may be let for such third service.

mode of raising and paying the same, which is to be regulated according to the provisions of the act.

By stat. 58 Geo. 3. c. 45. s. 66., in case of provision for the performance of an additional or third service being made by subscription, every person so subscribing, being a parishioner, is to have the option of any pew in such church or chapel, not being a pew held by faculty or prescription, for the time of such additional service and sermon, according to the amount of his subscription, or in case of equality of the sums subscribed, according to the date of his subscription, and continue to hold such pew so long as he pays such subscription, and no longer: provided that if at any future time the whole amount of such subscription fail to produce such a sum as may be deemed by the bishop a competent salary for the curate, the bishop may, in such case, require the churchwardens to raise, by letting a proportion of the pews, such further sums as may be sufficient for making up the salary: provided that the salary to be given to such curate for the performance of the additional service with sermon, shall in no case, except when raised entirely by subscription, exceed the sum of 80*l.* per annum.

By stat. 5 Geo. 4. c. 103. s. 5. bishops can consent to the building of additional churches or chapels, or to the purchase of buildings for that purpose, upon the application and certificate of twelve or more householders that there is not accommodation for more than one-fourth of the inhabitants, at the expense of such persons, or others willing to subscribe thereto; but they must provide out of the pew rents of such church or chapel a competent stipend for the spiritual person who may officiate therein, and for a clerk thereof, and for all other expenses incident to the performance of divine service, and for maintaining the church or chapel.

By stats. 58 Geo. 3. c. 45. s. 73. & 1 & 2 Gul. 4. c. 38. s. 22. churchwardens are to collect the pew rents and pay the salaries of the clergymen, &c.

By stat. 1 & 2 Vict. c. 107. s. 18. the Church Building Commissioners can, under that act, provide for the maintenance of the minister's clerk out of the pew rents; but the rights of persons holding pews free of rent, by faculty or prescription, are not to be affected.

By stat. 3 & 4 Vict. c. 60. s. 5. the Church Building Commissioners, with the consent of the bishop of the diocese, can augment the stipend of the incumbent or minister of a church or chapel, out of the surplus pew rents; but this power cannot be exercised when the surplus pew rents have been invested in government securities, to form a fund for holding or purchasing a parsonage house.

Under stat. 8 & 9 Vict. c. 70. s. 1. (1) claims of persons to pews in the old church are to be investigated, and if proved, such persons are to have pews in the new church on the same terms as in the old one.

PEWS IN NEW CHURCHES.

Stat. 58 Geo. 3. c. 45. s. 66.
Provision for the clergyman who may perform additional service.

Stat. 5 Geo. 4. c. 103. s. 5.

Stats. 58 Geo. 3. s. 75. and 1 & 2 Gul. 4. c. 38. s. 22.
Stat. 1 & 2 Vict. c. 107. s. 18.

Stat. 3 & 4 Vict. c. 60. s. 5.

Stat. 8 & 9 Vict. c. 70. s. 1.

PLURALITIES. (1)

The law respecting pluralities exclusively governed by stat. 1 & 2 Vict. c. 106. — Not more than two preferments to be held together — Nor two benefices, unless within ten miles of each other — Nor if the population of one such benefice is more than 3000, or where the joint yearly value exceeds 1000l. — Exceptions in favour of archdeacons — If yearly value of one benefice be less than 150l., and the population exceed 2000 persons, the two may be held jointly by an order from the bishop — Proviso as to residence in larger parish — Appeal from the order of the bishop — LICENCE OF DISPENSATION — Licence or dispensation to hold together any two benefices must be obtained from the Archbishop of Canterbury — Fee to registrar — Fee to seal-keeper — No stamp duty — No caution or security by bond before grant — Appeal from refusal by the archbishop to grant licence to the queen in council — Statements of certain particulars to be made by every spiritual person to the bishop of the diocese previous to application for a licence or dispensation — Income, taxes, population, and distance — Bishop may make inquiry as to the accuracy of the statement — The bishop to transmit a certificate to the Archbishop of Canterbury, setting forth the copy of the statement made to the bishop, and other particulars — Benefice in the jurisdiction of the Archbishop of Canterbury — How annual value of two benefices to be held together by dispensation to be estimated — Certificate to be deposited in the office of faculties, and to be conclusive evidence of value, population, and distance — Certificates evidence — Acceptance of preferment, contrary to the enactment of stat. 1 & 2 Vict. c. 106. vacates the former preferment ipso facto — Exceptions — Present rights of possession saved — Saving of other rights — MODE BY WHICH THE AMOUNT OF POPULATION IS TO BE COMPUTED — MODE BY WHICH DISTANCE IS TO BE COMPUTED — Definition of the term benefice — What is comprehended under the term cathedral preferment — Who is to be considered patron.

The law respecting pluralities governed by stat. 1 & 2 Vict. c. 106.

Stat. 1 & 2 Vict. c. 106. ss. 2, 3, & 4.
No more than two preferments to be held together.

Nor two benefices, unless within ten miles of each other.
Nor if the population of one such benefice is more than 3000.

Plurality, according to the common acceptation of the word, is where one and the same person is possessed of two or more ecclesiastical benefices, with the cure of souls simul et semel. The law respecting pluralities is governed by stat. 1 & 2 Vict. c. 106. (2), such statute having repealed the enactments of stat. 21 Hen. 8. c. 13. & stat. 57 Geo. 3. c. 99. respecting pluralities; and has likewise superseded the directions of the canon law.

By stat. 1 & 2 Vict. c. 106. s. 2. no spiritual person, holding more than one benefice, can accept or take to hold therewith, any cathedral preferment or any other benefice.

No spiritual person holding any cathedral preferment, and also holding any benefice, can accept or take to hold therewith, any other cathedral preferment, or any other benefice.

No spiritual person, holding any preferment in any cathedral or collegiate church, can accept and take to hold therewith, any preferment in any other cathedral or collegiate church.

By stat. 1 & 2 Vict. c. 106. s. 3. no spiritual person, holding any benefice, can accept and take to hold therewith, any other benefice, unless it be situate within ten statute miles from such first mentioned benefice.

By stat. 1 & 2 Vict. c. 106. s. 4. no spiritual person holding a benefice with a population of more than three thousand persons, can accept and take to hold therewith, any other benefice, having, at the time of his admission, institution, or being licensed thereto, a population of more than five hundred persons.

(1) *File Stephens' Ecclesiastical Statutes, 1836, 1837, in not.*

(2) The Church Building Commissioners

and the Ecclesiastical Commissioners have jurisdiction under stat. 1 & 2 Vict. c. 106.

No spiritual person holding a benefice with a population of more than five hundred persons, can accept and take to hold therewith any other benefice, having, at the time of his admission, institution, or being licensed thereto, a population of more than three thousand persons.

No spiritual person can hold together any two benefices, if at the time of his admission, institution, or being licensed to the second benefice, the value of the two benefices jointly exceed the yearly value of 1000*l.* (1)

Where any two benefices are within ten miles of each other, but by stat. 1 & 2 Vict. c. 106. cannot be holden together, and that one of the benefices be below the annual value of 150*l.*, and of which the population exceeds two thousand persons, the bishop to whom such benefices are subject, upon application made to him for that purpose by the incumbent, may state in writing the reason why such benefices shall be holden together, and in such case the incumbent can hold the two benefices. But in such case the bishop of the diocese within which such benefice, having a population exceeding two thousand persons, is situate, may from time to time, by an order under his hand, and revocable at any time, require that such incumbent shall keep residence on, and personally serve such benefice, during the space of nine months in each year; and if such incumbent do not, in obedience to the terms of such order, and until the same be revoked, reside on and personally serve such benefice, he will be liable to all penalties for non-residence, imposed by stat. 1 & 2 Vict. c. 106., notwithstanding he may have a legal exemption, permanent or temporary, from residence, or may be resident on some other benefice of which he may be possessed, or may be performing the duties of an office, the performance of the duties of which might in other cases be accounted as residence on some benefice.

But any such spiritual person may, within one month after service on him of any such order, appeal to the archbishop of the province who can confirm or rescind it.

By stat. 1 & 2 Vict. c. 106. s. 6., before any spiritual person can hold any two benefices together under the act, he must obtain from the Archbishop of Canterbury a licence or dispensation for the holding thereof; which licence or dispensation, the archbishop is empowered to grant under the seal of his office of faculties, upon being satisfied as well of the fitness of the person as of the expediency of allowing such two benefices to be holden together; and such licence or dispensation is to issue in such manner and form as the archbishop shall think fit; and for such licence or dispensation the registrar of the office is to be paid thirty shillings, and the seal-keeper two shillings; and no stamp duty, nor any other fee, is to be payable on the licence or dispensation, nor will any confirmation thereof be necessary; nor is any spiritual person, applying for any such licence or dispensation, required to give any caution or security, by bond or otherwise, before such licence or dispensation is granted.

If the Archbishop of Canterbury refuse to grant any such licence or dispensation, the Queen in council can, upon application by the person to whom such licence or dispensation shall have been refused or denied, enjoin the archbishop to grant such licence or dispensation, or to show sufficient

PLURALITIES.

Or joint
yearly value
exceeds
1000*l.*

Stat. 1 & 2 Vict.
c. 106. s. 5.
If yearly value
of one benefice
be less than
150*l.*, and the
population
exceed 2000
persons, the
two may be
held jointly,
by an order
from the
bishop.

Proviso as to
residence in
larger parish.

Appeal from
the order of the
bishop.

LICENCE OR
DISPENSATION.
Stat. 1 & 2 Vict.
c. 106. s. 6.
Licence or
dispensation to
hold together
any two bene-
fices must be
obtained from
the Archbishop
of Canterbury.
Fee to regis-
trar.

Fee to seal-
keeper.

No stamp duty.

No caution or
security by
bond before
grant.

Stat. 1 & 2 Vict.
c. 106. s. 6.

(1) Exceptions in favour of archdeacons are contained in stat. 1 & 2 Vict. c. 106. s. 2.
Vide ante, 47. tit. ARCHDEACONS.

PLURALITIES.

Appeal from refusal by the archbishop to grant licence to the Queen in council.

Stat. 1 & 2 Vict. c. 106. s. 7.

Statements of certain particulars to be made by every spiritual person to the bishop of the diocese, previous to application for a licence or dispensation.

Income.

Taxes, &c.

Population.

Distance.

The bishop may make inquiry as to the accuracy of the statement.

The bishop to transmit a certificate to the Archbishop of Canterbury, setting forth the copy of the statement made to the bishop and other particulars.

Benefice in the jurisdiction of Archbishop of Canterbury.

Stat. 1 & 2 Vict. c. 106. s. 8.

How annual value of two benefices to be held together by dispensation to be estimated.

cause to the contrary, and thereupon to make such order touching the refusal or grant of such licence or dispensation as to her majesty in council shall seem fit, and such order will be binding upon the archbishop.

By stat. 1 & 2 Vict. c. 106. s. 7. any spiritual person desirous of obtaining a licence or dispensation for holding two benefices together, must, previously to applying for a grant of the same, deliver to the bishop of the diocese, where such benefices are situate in the same diocese, or to the bishops of the two dioceses, where such benefices are situate in different dioceses, a statement in writing, verified as such bishop or bishops respectively may require, according to a form promulgated by the Archbishop of Canterbury, and approved by the Queen in council, in which statement such spiritual person must set forth, according to the best of his belief,

1. The yearly income arising from each of the benefices separately, on an average of the three years ending on the 29th day of September next, before the date of such statement: and the sources from which such income is derived.

2. The yearly amount, on an average of the same period of three years, of all taxes, rates, tenths, dues, and other permanent charges and outgoings, to which the benefices are respectively subject.

3. The amount of the population of each of the benefices, computed according to the last returns made under the authority of parliament.

4. The distance between the two benefices.

The bishop to whom such statement is delivered can make any inquiry he may think proper as to its correctness, in respect to the benefice or benefices within his diocese; and within one month after he have received such statement, he is required to transmit to the Archbishop of Canterbury a certificate under his hand, setting forth or having annexed to it a copy of such statement, and by which he must certify the annual value and the population of each of such two benefices, where both benefices are situate in his diocese, and the distance of the two benefices from each other, or (where the two benefices are situate in different dioceses) the amount at which he considers the annual value, and the population of the benefice within the diocese of the other bishop; and the distance of such benefice from the benefice in his own diocese that ought to be taken with respect to the licence or dispensation in question.

And whenever both or either of the benefices are in the diocese or jurisdiction of the Archbishop of Canterbury, a certificate in the same manner is to be made out by the archbishop, and retained by him.

By stat. 1 & 2 Vict. c. 106. s. 8. the annual value of any benefice for the purpose of such certificate is to be estimated, by deducting from the gross amount of the yearly income arising therefrom all taxes, rates, tenths, dues, and other permanent charges and outgoings to which such benefice is subject; but not to deduct or allow for any stipend to any stipendiary curate, nor for such taxes or rates, in respect of the house of residence on any benefice, or of the glebe land belonging thereto, as are usually paid by tenants or occupiers; nor for money spent in repairs or improvement of the house of residence and buildings and fences belonging thereto.

By stat. 1 & 2 Vict. c. 106. s. 9. the certificates to be transmitted to, or retained by, the archbishop, as the case may be, are to be deposited in

the office of faculties, and in the event of the required licence or dispensation being granted, are conclusive evidence of the annual value and population of each of the benefices to which the same relates, and of their distance from each other; and the registrar of the faculties is required to produce such certificates to any person who may require to inspect the same.

By stat. 1 & 2 Vict. c. 106. s. 11., if any spiritual person, holding any cathedral preferment or benefice, accept any other cathedral preferment or benefice, and be admitted, instituted, or licensed to the same contrary to the provisions of such statute, every preferment or benefice, so held by him, will become *ipso facto* void, as if he had died or had resigned the same; and if any spiritual person holding any two or more benefices accept any cathedral preferment, or any other benefice, or holding two or more cathedral preferments accept any benefice, or holding any cathedral preferments or benefices, accept another benefice, he must, before he is instituted, licensed, or in any way admitted to such cathedral preferment or benefice, in writing under his hand, declare to the bishop or bishops within whose diocese or dioceses any of the cathedral preferments or benefices previously holden by him are situate, which cathedral preferment and benefice, or which two benefices (such two benefices being tenable together under the provisions of the act) he proposes to hold together; and a duplicate of such declaration is to be transmitted to the registry of the diocese, and be there filed; and immediately upon his being instituted, licensed, or in any way admitted to the cathedral preferment or benefice which he has so accepted, such preferments or benefices as he previously held, and as he shall not have declared his intention to hold, or such benefice as is not tenable under the provisions of the act with such newly accepted benefice, will become *ipso facto* void, as if he had died or resigned the same; and if he refuse, or wilfully omit, to make such declaration, every cathedral preferment and benefice which he previously held will be *ipso facto* void. But it is provided, that this is not to be construed to affect the provisions in the excepted cases with respect to archdeacons, or with respect to spiritual persons holding with any cathedral preferment, and with or without a benefice, offices in the same cathedral or collegiate church.

By stat. 1 & 2 Vict. c. 106. s. 12. nothing is to prejudice or affect the right of possession in any cathedral preferment or benefice to which any spiritual person shall have been collated, admitted, instituted, or licensed, or which shall have been otherwise granted to any spiritual person before the passing of the act, unless he shall, after the passing of the act, accept or take some cathedral preferment or benefice contrary to its provisions.

By stat. 1 & 2 Vict. c. 106. s. 13. nothing is to be construed to prevent any spiritual person possessed of one or more than one benefice at the time of the passing of the act, and to whom, or in trust for whom, the advowson of, or the next presentation or nomination to any other benefice has been conveyed, granted, or devised by any deed or will made before the 23d day of December, 1837, from taking the last-mentioned benefice, and holding together such benefice and any one such first mentioned benefice (although the benefices to be held together be not within the limits, nor under the joint yearly value, nor the population thereof under the amount, pre-

PLURALITIES.

Certificate to be deposited in the office of faculties, and to be evidence of value, population, and distance.

Stat. 1 & 2 Vict. c. 106. s. 11.

Acceptance of preferment contrary to the enactments of stat. 1 & 2 Vict. c. 106. vacates the former preferment *ipso facto*.

Exceptions.

Stat. 1 & 2 Vict. c. 106. s. 12. Present rights of possession saved.

Stat. 1 & 2 Vict. c. 106. s. 13. Saving of other rights.

PLURALITIES.

scribed by the act), but so nevertheless that the two benefices be such as might have been held together before the passing of the act by dispensation duly granted and confirmed; and the bishop of the diocese in which such second or other benefice is situate may, after a licence or dispensation has been obtained by such spiritual person as is by the act required for holding two benefices together, admit, institute, or license such spiritual person thereto; unless such spiritual person, after the passing of the act, and before he be so admitted, instituted, or licensed to such second or other benefice, shall have accepted and taken any cathedral preferment or any other benefice, the holding of which such second or other benefice would be contrary to the provisions of the act.

Stat. 1 & 2 Vict.
c. 106. s. 130.
Mode by which
the amount of
population is to
be computed.

The mode by which the amount of the population is to be computed is regulated by stat. 1 & 2 Vict. c. 106. s. 130., which directs, that it is to be taken from the latest returns of population made under any act of parliament for that purpose, at the time when the question shall arise, if such returns apply to the place respecting which the question shall be; but if such place only form part of a parish or district named in such returns, then such returns are to be taken to represent truly the population of the parish or district named therein, and from them the population of the place is to be computed, according to the best evidence of which the subject shall be capable.

Stat. 1 & 2 Vict.
c. 106. s. 129.
Mode by which
distance is to be
computed.

By stat. 1 & 2 Vict. c. 106. s. 129. the distance between any two benefices is to be computed from the church of the one to the church of the other, by the nearest road or footpath, or by an accustomed ferry; and if on one of the benefices in question there be two or more churches, then the distance is to be computed from or to the nearest of such churches as the case may be; or if on one of such benefices there be no church, then in such manner as shall be directed by the bishop of the diocese in which the benefice, proposed to be taken and held by any spiritual person in addition to one already held by him, shall be locally situate.

Stat. 1 & 2 Vict.
c. 106. s. 124.
Definition of
the term benefice.

It may not perhaps be inexpedient to reiterate (1) that, by stat. 1 & 2 Vict. c. 106. s. 124., the term "benefice" means benefice with cure of souls, and no other, (unless it otherwise appear from the context,) and comprehends all parishes, perpetual curacies, donatives, endowed public chapels, parochial chapelries, and chapelries or districts belonging or reputed to belong, or annexed or reputed to be annexed, to any church or chapel: and that the term "cathedral preferment" comprehends every deanery, archdeaconry, prebend, canonry, office of minor canon, priest vicar, or vicar choral, having any prebend or endowment belonging thereto, or belonging to any body corporate consisting of persons holding such office, and also every precentorship, treasurership, sub-deanery, chancellorship of the church, and other dignity and office in any cathedral or collegiate church, and every mastership, wardenship, and fellowship in any collegiate church.

What is com-
prehended
under the term
"cathedral pre-
ferment."

(1) *Vide ante*, 141. 237.

PRESENTATION. (1)

1. DEFINED, p. 932.

2. CAPACITY TO PRESENT AND BE PRESENTED, pp. 932—952.

GENERALLY — *All persons seised in fee, in tail, or for life, &c. can present — Presentee must be qualified in accordance with stat. 13 & 14 Car. 2. c. 4. — Improper exclusion of Irishmen from the dignities of the United Church — ALIENS — BANKRUPTS — An advowson passes under a fiat of bankruptcy — If the church be void, the patron must present, although he may be a bankrupt — Stat. 6 Geo. 4. c. 16. s. 77. — CLERGYMEN — Stat. 12 Anne, st. ii. c. 12. s. 2. — Stat. 9 & 10 Vict. c. 88. — COGNISOR — Where the cognisor would be allowed to nominate — COMMENDAM — Difference between the capere and retinere — Stat. 6 & 7 Gul. 4. c. 77. s. 18. — No commendams to be held by bishops — COPARCENERS — If the patrons have the patronage by descent as coparceners, the ordinary bound to admit the clerk of the elder sister — Where the patrons vary in presentment the church not litigious — The privilege of the elder sister to present first in turn, goes to her assignee — Judgment of Mr. Baron Clarke in *BULLER v. EXETER* (BISHOP OF) — Stat. 7 Anne, c. 18. — If coparceners, &c. be seised of an advowson, and a partition be made to present by turns, each will be seised of a separate estate, to present accordingly — Stat. 7 Anne, c. 18. is not retrospective — The clerk of a coparcener being once complete incumbent, though afterwards deprived, the turn is served — Effect of a coparcener allowing a bishop wrongfully to collate — What is considered a recontinuing of the incumbency — Stat. 13 Edw. 1. st. i. c. 5. s. 2. — Presentations to a church by composition — If a party be usurped upon in his turn, the party wronged is not driven to his quare impedit — Partition — Between coparceners a composition can either be by record, by deed, or by parol, but otherwise between strangers in blood — Where there are divers patrons, and they vary in their presentment, the ordinary is not bound, if they be joint-tenants or tenants in common, to admit any of their clerks — CORPORATIONS — Right of nomination may be sold — Where the right of nomination or presentation falls within the provisions of stat. 1 & 2 Vict. c. 31. — Effect of the provisions of stat. 5 & 6 Gul. 4. c. 76. s. 139. and stat. 1 & 2 Vict. c. 31. as to the right of presentation to the office of curate or reader — Judgment of Chief Justice Tindal in *HINE v. REYNOLDS*. — CROWN (THE) patron paramount of all benefices — Stat. 1 Eliz. c. 1. — Presentation of benefices when sees vacant — Prerogative presentations — Where the King has an interest in the advowson — Advowsons created by statute — Presentation by the Lord Chancellor — Cannot be removed after induction — CURTESY (TENANT BY) — Husband may present jointly with his wife, and after her death the right of presentation is lodged in him for his life — DOWER (TENANTS IN) — If a man be seised of an advowson, and take a wife and die, the heir will have two presentments, and the wife a third — EXECUTORS — HEIRS — INFANTS — JOINT TENANTS — When one joint tenant presents — Joint tenants may make partition to present by turns — LAYMAN OR DEACON — LUNATICS — MORTGAGEE can make no profit by presenting to the church, nor can account for any value in respect thereof, to sink or lessen his debt — The ordinary will be compelled to institute the clerk of the mortgagor any time before foreclosure — Covenant in the mortgage deed, that on every avoidance of the church the mortgagee shall present — Petition on behalf of a mortgagor that the mortgagee of a naked advowson shall accept of his nominee, and present him upon an avoidance, the incumbent being dead — Where the mortgagee of a manor and advowson was in possession when the mortgagor made a simoniacal presentation of A., who was rejected by the bishop — OUTLAWS — PATRON — ROMAN CATHOLICS — Stat. 1 G. & M. sess. 1. c. 26. ss. 2. & 4. — Stat. 12 Anne, st. ii. c. 14. s. 1. — Stat. 11 Geo. 2. c. 17. s. 6. — Stat. 3 Jac. 1. c. 5. — 1 G. & M. sess. 1. c. 26. — Stat. 12 Anne, st. ii. c. 14. — TENANTS IN COMMON — TRUSTEES — A grant of the next avoidance to one without his privity, is a resulting trust for the grantor — Where there are several cestuique trusts of a presentation they must all agree — A general devise to trustees, does not carry with it a right to present to a living — Where by neglect the number of trustees to present to a living was not filled up at the time of the avoidance — Nomination by popular election — An absolute devise to trustees carries away the nomination from the heir — CHARITABLE TRUSTEES — Stat. 1 & 2 Vict. c. 31. — Stat. 7 Gul. 4. & 1 Vict. c. 26. s. 30. — USURPER — Presentation by an usurper void — Distinction between presentation by an usurper and patron.*

3. REVOCATION OF PRESENTATIONS, pp. 952—954.

The Crown may revoke its presentation before induction — Revocations in law — When presentations, though properly made, may be revoked.

(1) *Vide tit. CHURCH BUILDING STA- LAPSE — PLURALITIES — QUARE IMPEDIT TUTES — DONATIVE — ENDOWMENTS — — SIMONY.*

4. PRESENTATIONS HOW MADE, p. 954.

Must be in writing — How a corporation must present — Evidence of a presentation — Stamp upon presentation.

5. FORMS OF PRESENTATION, pp. 954—956.

DEFINED.

1. DEFINED.

Presentation, nomination, and collation are sometimes in law used for the same thing, but they have different properties; for presentation is the offering a clerk to the ordinary; nomination is the offering a clerk to the patron; and collation is the giving of the church to the clerk, and is that act by which the ordinary admits and institutes a clerk to a church or benefice of his own gift, in which case there is no presentation. Presentation sometimes is taken to comprehend not only presentation, but admission, institution, and induction. (1)

CAPACITY TO
PRESENT AND
BE PRESENTED.

GENERALLY.
All persons
seised in fee,
in tail, or for
life, &c. can
present.

2. CAPACITY TO PRESENT AND BE PRESENTED. (2)

All persons seised in fee, in tail, or for life, or possessed of a term for years of a manor to which an advowson is appendant, or of an advowson in gross, may present to a church.

(1) Watson's Clergyman's Law, 148. 1 Inst. 120. (a).

(2) Irishmen seeking clerical employment in England have been discouraged to an extent and in a mode inconsistent with the spirit of the act of union between England and Ireland. This reprehensible and narrow-minded line of conduct is not, however, universal. The Bishop of Exeter (*vide ante*, tit. ORDINATION) does not exclude Irishmen from his diocese; neither, among other prelates, do the Bishops of Lincoln, St. Asaph, Winchester, Hereford, Lichfield, or Norwich; and in reply to a letter from the author to the Bishop of Worcester, his lordship thus writes: — "I beg to inform you that an Irishman, or an Englishman having been ordained in Ireland, is not disqualified from the performance of clerical duties in this diocese. Considering the Established Church to be now the united Church of England and Ireland, I have not felt myself justified in making any distinction between the two branches of the same church. All, therefore, that I require from Irish candidates for orders is, that they should have passed through the theological course at Trinity College, Dublin; a condition which is, I understand, considered indispensable by all the Irish bishops."

The rule of exclusion has been rigidly acted upon in regard to the higher benefices in England of the united church. The gross injustice of this proceeding is

rendered the more offensive by the fact, that the honours and emoluments of the Irish branch of the united church are freely thrown open to clergymen ordained in England. Thus, of the great prizes in the Irish branch of the church, Armagh stands first, both in dignity and in emolument. This see has been occupied exclusively by men from the English universities, ever since the year 1702, a period of 145 years. For the first 120 years of that period the primates, eight in number, were all Englishmen by birth, as well as by education. The present primate, who has held the office for twenty-five years, is an Irishman, but was educated at Oxford.

Dublin stands next to Armagh in point of dignity, and since the year 1682 to the present time (a period of 165 years) this see has been held as follows by

	Years.
3 Irishmen educated at Dublin University, for an aggregate period of	41
2 Irishmen educated at Oxford, for an aggregate period of	10
9 archbishops (eight English, and one Scotch), all educated at the English universities, for an aggregate period of	114

14 Archbishops. 165

The above period of 165 years includes forty-seven since the union. During those forty-seven years, Dublin has been held by

As to the persons capable of being presented to a benefice before stat. 13 & 14 Car. 2. c.4., deans and even laymen might have been presented to a benefice; but by virtue of that act, none but a priest, ordained according to the form and manner by the Book of Common Prayer prescribed, is capable of being instituted to any parsonage, vicarage, benefice, or other ecclesiastical promotion or dignity whatsoever, except only the king's professor of law within the University of Oxford, who may hold the prebend of Shipton in the cathedral church of Salisbury, although he be but a layman.

CAPACITY TO
PRESENT AND
BE PRESENTED.

Presentee must
be qualified in
accordance with
stat. 13 & 14
Car. 2. c. 4.

It seems that an alien, who is a priest, may be presented to a church. (1) The supposed reason was, that they being spiritual persons would not adhere to our enemies in time of war; but the contrary was found by practice. (2) By stat. 3 Rich. 2. c. 3. and stat. 1 Hen. 5. c. 7. Frenchmen were disabled to have benefices in England. And the words of Lord Coke (3) are, "upon consideration had of the statutes 3 Rich. 2., 7 Hen. 4., 1 Hen. 5., Rot. Parl. 6 Hen. 4. n. 48., and 4 Hen. 6. n. 29., if an alien or stranger born be presented to a benefice, the bishop ought not to admit him, but may lawfully refuse him, which we have added, for that the abridgments or late impressions may deceive you."

ALIENS.

In *Dr. Seaton's case* (4), who was born in Scotland before the union of the two realms, it was adjudged, that he was capable to be presented to a benefice in England; and it was said he would have been qualified, if he had been born in Flanders, Spain, or within any other kingdom, friend and in league with the king of England; as the Bishop of Spolettoes, who was preferred to the deanery of Windsor, and enjoyed the same. And it was admitted, that such incumbent might maintain any action, real, personal,

	Years.
1 Irishman by birth and education (Archbishop Magee) for - -	9
2 Irishmen by birth, educated at Oxford, for an aggregate period of -	10
3 Englishmen, educated at the English universities, for an aggregate period of - - - - -	28
—	—
6 Archbishops.	47
Derry is next to Armagh in point of emolument, and since 1703, this see has been held by twelve prelates, of whom	
9 were English by birth and education. Aggregate period - -	99
3 were Irish by birth, and probably also by education, aggregate period	45
—	—
12 Bishops.	144

The other sees do not, in general, present so great a preponderance of Englishmen; but still they exhibit a large amount of church patronage abstracted from Irishmen, in order to be bestowed upon English churchmen, generally speaking of very inferior character, as respects the qualifications which must ever be deemed essential for the office of a Christian bishop.

At the present moment the Irish episcopal bench is occupied by thirteen prelates, of whom five only are Dublin men. The

remaining eight (including both the archbishops) have received their education at the English universities. Of these eight, two are Englishmen.

On the other hand, not even a solitary instance exists of an Irishman advanced to an English bishopric since the Reformation. Probably the same may be affirmed with respect to inferior English dignities, such as deaneries and archdeaconries. The union has caused no difference in this respect.

With respect to translations, there have been, since the Reformation, only two from Irish to English sees, the prelate translated, in each case, being an Englishman.

1. Hugh Curwin, archbishop of Dublin (he had previously been dean of Hereford and archdeacon of Oxford) growing old and infirm, and wishing to end his days in his own country, was translated to the see of Oxford in 1567.

2. Edward Jones, bishop of Cloyne, was translated from that see to St. Asaph in 1692.

(1) 2 Rol. Abr. *Presentment* (L), 348. pl. 4. 17 Vin. Abr. *Presentation* (L, n.), 330.

(2) Watson's *Clergyman's Law*, 214. (3) 4 Inst. 338. Stephens' *Ecclesiastical Statutes*, 77. 101.

(4) Hughes' *Parson's Law*, 88. 17 Vin. Abr. *Presentation* (L, a.), 331.

**CAPACITY TO
PRESENT AND
BE PRESENTED.**

BANKRUPTS.

An advowson passes under a fiat of bankruptcy.

If the church be void, the patron must present, although he may be a bankrupt.

Stat. 6 Geo. 4.
c. 16. s. 77.

CLERGYMEN.

Stat. 12 Anne,
st. ii. c. 12.
s. 2.

or mixed, for any thing concerning the glebe or the possessions of the church as prior aliens might have done; for although he be an alien born out of the king's dominions, yet the action was brought, not in his own right, but in the right of his church; not in his natural, but in his politic capacity; and therefore the action could be sustained.

Where a bankrupt is entitled to an advowson, or to a right of next presentation to a living, it can be sold for the benefit of his creditors; but if the church be void at the time of the sale, or if a lapse occur before conveyance to a purchaser, the bankrupt himself must present, though the sale of the advowson is good. (1) For a sale made under such circumstances, is for the payment and satisfaction of just debts; but the void turn of a church is not a matter valuable, which can go in discharge or satisfaction of such debts, though the advowson or next presentation during the time the church is full may be so accounted. (2)

And by stat. 6 Geo. 4. c. 16. s. 77. "all powers vested in any bankrupt, which he might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice), may be executed by the assignees for the benefit of the creditors in such manner as the bankrupt might have executed the same."

Stat. 12 Anne, st. ii. c. 12. s. 2., after reciting that some of the clergy have procured preferments for themselves by buying ecclesiastical livings, and others have been thereby discouraged, enacts, that if any person for any sum of money, reward, gift, profit, or advantage directly or indirectly, or by reason of any promise, agreement, grant, bond, covenant, or other assurance of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, in his own name or in the name of any other person, take, procure, or accept the next avoidance of or presentation to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, and be presented or collated thereupon, it shall be void, and be deemed a simoniacal contract; and that the crown may present or collate unto, or give or bestow every such benefice, dignity, prebend, and living ecclesiastical, for that one time or turn only; and the person so corruptly taking, procuring, or accepting of any such benefice, dignity, prebend, or living, is to be adjudged a disabled person in law to have and enjoy the same benefice, &c. and be subject to the same ecclesiastical punishment as if such corrupt agreement had been made after such benefice, dignity, prebend, or living ecclesiastical had become vacant. (3)

But this act being only restrictive upon clergymen, all other persons continue to purchase next avoidances as they did before, and present thereunto as they think proper.

Stat. 9 & 10
Vict. c. 88.

By stat. 9 & 10 Vict. c. 88. agreements or other proceedings touching any advowson or right of presentation or nomination of any spiritual person to any cure or benefice, donative, or perpetual curacy, or to serve any church or chapel authorised by stats. 1 Geo. 1. st. ii. c. 10., and 8 & 9 Vict. c. 70., or by any act recited therein, are to be deemed lawful.

COGNITOR.
Where the

It was said in *Arundel v. Gloucester (Bishop of)*, that when a manor with an advowson appendant was extended on statute merchant, and that the

(1) Gibson's Codex, 794.

(2) Watson's Clergyman's Law, 106, 108.
Montagu and Ayrton on Bankruptcy, 533.

(3) The canon law ordained that any

clergyman who purchased the right of patronage or next presentation should be deprived of it *ipso jure*. X. 3. 38. 6.

church became void during the cognisee's estate, he might present to it. But it is supposed, that if a case of this kind were now to happen, it would be governed by analogy to the case of a mortgagor, and that the cognisor would be allowed to nominate.

Presentations by commendam may be defined as being a benefice or ecclesiastical living, which being void is commended by the crown to the care of some sufficient clerk until it may be conveniently supplied with a pastor.

Where a clerk was presented to a benefice with cure, and admitted, instituted, and inducted, so that the church was full, and was afterwards presented to an incompatible benefice, or elected to a bishopric, he could obtain, before institution to the second benefice, or before creation to the bishopric, a faculty or dispensation of retainer, an invention of Pope Leo IV. (1)

This right in the case of a bishopric was not a right of patronage in the king, nor a right of eviction, as it ejected nobody; nor an usurpation, as it was a rightful act. But it was a contingent casual right, arising upon a particular event—the incumbent's becoming a bishop.

Not only dignitaries and benefices, but deanries, prebends, headships of colleges and hospitals, have been granted in commendam. (2)

In every commendam capere, the consent of the patron was necessary before it was executed, and the consent expressed in the instrument of commendam (3); and it could not have been made in any general terms to an uncertain church, but to a certain church then void (4); the patron was the first actor, and the commendam had the effect of an admission, institution, and induction. (5)

The main difference between the commendam retinere and the commendam capere, was the holding that which was already one's own, and the taking that which belonged to another. (6)

But by stat. 6 & 7 Gul. 4. c. 77. s. 18. no ecclesiastical dignity, office, or benefice can be held in commendam by any bishop, unless he held it on August 13. 1836; and every commendam thereafter granted, whether to retain or to receive, and whether temporary or perpetual, will be absolutely void.

Where lands descend to daughters, sisters, or other females, of kin in equal degree, they are coparceners; and are considered but as one heir to their ancestor, and they or their heirs respectively hold the lands together, till a partition be made.

By the canon law, when either coparceners, joint tenants, or tenants in common presented, the bishop if he pleased might judge of the fitness of the clerks, and choose any one of them. (7)

But by the common law, as stated by Lord Coke, "if the patrons have the patronage by descent as coparceners, then is the ordinary bound

CAPACITY TO
PRESENT AND
BE PRESENTED.

cognisor would
be allowed to
nominate.

COMMENDAM.

Difference be-
tween the
capere and
retinere.

Retinere hav-
ing expired,
capere has been
granted.

Stat. 6 & 7 Gul.
4. c. 77. s. 18.

No commen-
dams to be held
by bishops.

COPARCENERS.

If the patrons
have the pa-
tronage by

(1) *Le Case de Commenda*, Davis (Sir J.), 79. *Rex v. Llandaff (Bishop of)*, 2 Str. 1006.

(2) Com. Dig. tit. *Prerogative* (D. 19.).

(3) *Reg. v. Coventry (Bishop of)*, 2 And. 184. *Colt v. Glover*, 1 Rol. 452. S. C. nom. *Colt and Glover v. Coventry and Lichfield (Bishop of)*, Hob. 144. 149. 151. *Evans v. Ascuthe*, Palm. 477. *Le Case de Commenda*, Davis (Sir J.), 74. Gibson's

Codex, 913. *Rex v. Llandaff (Bishop of)*, 2 Str. 1006. Watson's *Clergyman's Law*, 203.

(4) *Colt and Glover v. Coventry and Lichfield (Bishop of)*, Hob. 150.

(5) *Ibid.* 151.

(6) *Rex v. Llandaff (Bishop of)*, 2 Str. 1009.

(7) Gibson's *Codex*, 765.

CAPACITY TO
PRESENT AND
BE PRESENTED.

descent, as
coparceners,
the ordinary
bound to admit
the clerk of the
elder sister.

Where the
patrons vary in
presentment,
the church not
litigious.

The privilege
of the elder
sister to pre-
sent first in
turn goes to her
assignee.

Judgment of
Mr. Baron
Clarke in
Buller v. Exeter
(*Bishop of*).

to admit the clerk of the eldest sister; for the eldest shall have the preferment in the law if she will (1), and then at the next avoidance the next sister shall present, and so by turn one sister after another, till all the sisters, or their heirs, have presented (2) and then the eldest sister shall begin again; and this is called a presenting by turn; and it holdeth always between coparceners of an advowson, except they agree to present together, or that they agree by composition to present in some other manner; and if they do so, the agreement must stand." (3) But "if after the death of the common ancestor the church voideth and the eldest sister presented together with another of the sisters, and the other sisters every one in their own name or together, in that case the ordinary is not bound to receive any of their clerks, but may suffer the church to run into lapse; for he shall not be bound to receive the clerk of the eldest sister, but where she presenteth in her own name." (4)

"And in this case, where the patrons vary in presentment, the church is not properly said *litigious*; so that the ordinary should be bound at his peril to direct a writ to inquire de jure patronatus, for that writ lieth where two present by several titles; but these patrons present all in one title, and therefore the ordinary may suffer it to pass, if he will, into the lapse." (5)

The privilege of the elder sister to present first in turn goes to her assignee; thus, in *Buller v. Exeter (Bishop of)* (6) the estate of an advowson descended to two daughters as parceners. The church became vacant twice in their time, and both joined in presentation. The elder married, settled her own estate in the common way, and died. The other daughter, before it became vacant again, married and made a settlement of her part. A vacancy happening, Buller the husband of the eldest, entitled to her estate as tenant by courtesy, or under the settlement, claimed as in her turn, and presented. But the bishop objected thereto, because the younger sister and her husband, claiming an equal right to presentation as tenants in common, did not join; but he was willing to admit the person having the legal right. Upon these facts Mr. Baron Clarke, in the absence of the Master of the Rolls, said: "I have always thought, that the many alternate presentations in this kingdom must arise from estates descending in parcenary, where advowsons are upon them. It is the only estate I know, which in course, and by operation of law only, falls on several persons making but one heir, without the intervention of conveyances by will or otherwise of the owner of the estate; which makes it, although in some instances partaking of a tenancy in common, different from that and from a joint-tenancy, which are made by conveyance, and descendible in a different manner. An advowson is a particular sort of an estate so descendible. And as it is impossible to be divided into parts so as to be enjoyed separately, as it is natural to follow the course that has been practised, that each parcener should have a turn to present; and, to prevent confusion, begin with the eldest. And in all the cases mentioned out of Bro. Abr. and F. N. B. where disputes arose, whether the alienee of the eldest sister should

(1) Vide *Thrale v. London (Bishop of)*,
1 Hen. Black. 412.

(2) 2 Rol. Abr. *Presentment* (G), 346.
pl. 1.

(3) Doctor and Student, 200.

(4) Ibid. 1 Inst. 186. (b), 243.

(5) Doctor and Student, 200.

(6) 1 Ves. sen. 340.

have the same privilege, or whether it should go to the next sister, it is determined in favour of the alienee." (1)

By stat. 7 Anne, c. 18. if coparceners, or joint-tenants, or tenants in common be seised of any estate of inheritance in the advowson of any church or vicarage, or other ecclesiastical promotion, and a partition be made between them to present by turns, thereupon every one shall be taken and adjudged to be seised of his or her separate part of the advowson to present in his or her turn; as if there be two, and they make such partition, each shall be said to be seised, the one of the one moiety to present in the first turn, the other of the other moiety to present in the second turn; in like manner if there be three, four, or more, every one shall be said to be seised of his or her part, and to present in his or her turn.

It was decided in *Att. Gen. v. Lichfield (Bishop of)* (2) that this statute is not retrospective.

The clerk of a coparcener being once complete incumbent, though afterwards deprived, the turn is served; and so it is where by reason of some incapacity the institution was voidable by sentence declaratory but not void, because the church is full, until the sentence be pronounced; but if, after presentation, institution, and induction, the church remain by special declaration of the law actually void, as for not reading the articles or the like, then the turn is not served, but the patron may present again, because the church was never full. (3)

As a presentation by turn to a church is a chose in action, if a bishop deprive a clerk, and without notice wrongfully collate, and one coparcener afterwards grant over the advowson, the grantee cannot present, as in his turn, on the death of the incumbent. (4)

If a person presented by a coparcener be incumbent, and deprived, and the next present, notwithstanding that the second is complete incumbent, yet if he be deprived, and the first restored, the turn is not served; because the restoring of the first is a re-continuing of his incumbency upon the foot of the former presentation, institution, and induction, who also dying incumbent will be the last presentee. (5)

By stat. 13. Edw. 1. st. i. c. 5. "sometimes, when an agreement is made between many claiming one advowson, and enrolled before the justices in the roll, or by fine, in this form, that one shall present the first time, and at the next avoidance another, and the third time another, and so of many in case there be many; and when one hath presented, and had his presentation, which he ought to have according to the form of their agreement and fine, and at the next avoidance he to whom the second presentation belongeth is disturbed by any that was party to the said fine, or by some other in his stead; it is provided, that from henceforth they that be so disturbed shall have no need to sue a quare impedit, but shall resort to the roll or fine; and if the said concord or agreement be found in the roll or fine, then the sheriff shall be commanded, that he give knowledge unto

CAPACITY TO PRESENT AND BE PRESENTED.

By stat. 7 Anne, c. 18. if coparceners, &c. be seised of an advowson, &c., and a partition be made to present by turns, each will be seised of a separate estate to present accordingly.

Stat. 7 Anne, c. 18. is not retrospective.

The clerk of a coparcener, being once complete incumbent, though afterwards deprived, the turn is served.

Effect of coparcener allowing a bishop wrongfully to collate.

What is considered a re-continuing of the incumbency.

Stat. 13 Edw. 1. st. i. c. 5. s. 2. Presentations to a church by composition.

(1) *Seymour v. Bennet*, 2 Atk. 482. *Barber v. London (Bishop of)*, Willes, 662. *Morris v. Webber*, Moore (Sir F.), 225. *Harris v. Nichols*, Cro. Eliz. 19.

(2) 5 Ves. 828.

(3) *Windsor's case*, 5 Co. 102. Gibson's Codex, 765. *Windsor v. Canterbury (Arch-*

bishop of), Cro. Eliz. 687. *Baker v. Brent*, ibid. 679.

(4) *Leach v. Coventry (Bishop of)*, ibid. 811.

(5) *Windsor's case*, 5 Co. 102. Gibson's Codex, 765.

CAPACITY TO
PRESENT AND
BE PRESENTED.

If a party be
usurped upon
in his turn, the
party wronged
is not driven to
his quare
impedit.

Partition.

Between
coparceners a
composition
can either be
by record, by
deed, or by
parol, but
otherwise be-
tween strangers
in blood.

Where there
are divers
patrons, and
they vary in
their present-
ment, the ordi-
nary is not
bound, if they
be joint-tenants
or tenants in
common, to
admit any of
their clerks.

CORPORATIONS.
Stat. 1 & 2 Vict.
c. 31.

the disturber, that he be ready at some short day, containing the space of fifteen days or three weeks, as the place happeneth to be near or far, for to show, if he can allege any thing, wherefore the party that is disturbed ought not to present; and if he come not, or peradventure doth come, and can allege nothing to bar the party of his presentation by reason of any deed made or written since the fine was made or enrolled, he shall recover his presentation with his damages."

And this, observes Lord Coke, "extendeth as well to strangers of blood as to coparceners that are privy in blood; and if one of the parties or his heirs, or any stranger usurp in the turn of another, the party wronged is not driven to his quare impedit; for so it may be, that the quare impedit, or assise of darrein presentment, may fail; and yet he may have remedy by this act; for albeit there be a plenarty by six months, yet the party may have a scire facias upon the roll or fine, and therein recover the presentation and damages." (1)

Though coparceners may make composition to present by turns, this being no more than the law appoints, the inheritance is not divided. (2)

In the case of *Salisbury (Bishop of) v. Phillips* (3), where two were seised in fee of the advowson in gross as joint tenants, and by indenture agreed from thenceforth to be seised thereof as tenants in common, and not as joint tenants, so as they and their respective heirs should present severally and by turns, Chief Justice Holt said, that a composition might be either by record, or by deed, or by parol; that after the first way, if one present, the other was not by an usurpation put to a quare impedit; that by the second way, the composition is good, and if it be once executed on all sides, he that brings a quare impedit, need not mention the composition which shows the very right and inheritance to be severed, and that a separate interest is vested in each, to present alternately; that the third way may be between parceners, but between strangers in blood composition cannot be without deed. (4)

When there are divers patrons, and they vary in their presentment, if they be joint-tenants, or tenants in common of the patronage, the ordinary is not bound to admit any of these clerks; and if the six months pass, then he may present by the lapse; but he cannot present within the six months, for if he do, they may agree and bring a quare impedit against him and remove his clerk, and thus, the ordinary will be a disturber. (5)

By stat. 1 & 2 Vict. c. 31. the power of alienating advowsons is granted to municipal corporations, and their right of nomination can be sold. (6)

It appeared in *Hine v. Reynolds* (7) that by a charter of the 6th James 1. the tithes, &c. within the lordship of Bury St. Edmunds were granted (subject to a then existing lease thereof for forty years) to the alderman and burgesses of that town, who agreed, after the expiration of the lease, to pay 8*l.* 10*s.* of the tithes and glebe lands yearly to the curates

(1) 2 Inst. 361. 365. 1 ibid. 18. (a), 166. (b), 186. (b), 243. (a). *The case of Mines*, Plowd. 333. *Harris v. Nichols*, Cro. Eliz. 18. *Thrale v. London (Bishop of)*, 1 Hen. Black. 412. *Birch v. Lichfield (Bishop of)*, 3 B. & P. 449. *Barker v. London (Bishop of)*, Willes, 659.

(2) 1 Inst. 18. (a).

(3) 1 Ld. Raym. 537. 1 Salk. 43. Carth. 505.

(4) Gibson's Codex, 764.

(5) Doctor and Student, 199, 200. *Reynoldson v. Blake*, 1 Ld. Raym. 197.

(6) Stephens' Ecclesiastical Statutes, 1832.

(7) 2 M. & G. 72.

and ministers of the parish churches of St. Mary and St. James, in Bury St. Edmunds.

By another charter of the 12th James I., reciting that he expected the aldermen and burgesses of Bury aforesaid would provide and sustain approved, able, and fit ministers and preachers of the word, and other officers, in the churches aforesaid necessary, at all times to come, the king granted to them and their successors the whole and entire rectories and vicarages of Bury St. Edmunds and of the parish churches, and the advowsons and donations, free dispositions, and rights of patronage of the same churches, and all manner of tithes, &c.

The corporation made no endowment, and gave no fixed stipend to the ministers of the churches, but subsequently to the year 1687 appointed two clergymen to each church, the one called a preacher or lecturer, and the other a curate or reader, the former being paid by a salary from the corporation, varying from a hundred to eighty pounds a year; and the latter, since the year 1712, deriving his only remuneration from the surplice fees and Easter offerings.

The office of curate or reader of the parish of St. James having become vacant before any sale had been effected by the corporation, it was held that it was necessary to consider whether the right of presentation or nomination to that office was within stat. 5 & 6 Gul. 4. c. 76. s. 139., inasmuch as it clearly fell within the provisions of stat. 1 & 2 Vict. c. 31.; and that the necessary consequence of holding it to be within the latter statute was to bring it within the proviso of the 139th section of the former act, and consequently that such right of presentation or nomination vested in the bishop of the diocese; Lord Chief Justice Tindal observing, "The question which is stated for our opinion at the end of this special case, is, whether the right of nominating and appointing a clergyman to the office of curate or reader of the parish of St. James, in Bury St. Edmunds, was, upon the death of the late curate or reader, vested in the Bishop of Ely, as bishop. And the determination of this question appears to us, to depend upon the consideration of two points, viz. first, whether, considering the nature and description of the right of the corporation as set out in the case, such right to nominate and appoint, falls within the 139th section of the 5 & 6 Gul. 4. c. 76., or within 1 & 2 Vict. c. 31. For if this right falls within the former act, there can be no doubt that the proviso for the interim appointment will govern the present case; but if, on the other hand, this right of nomination and appointment is not comprehended within the former act, but falls within the provisions of the latter, then arises the second question, whether the proviso contained in the 139th section of the 5 & 6 Gul. 4., upon which alone the right of supplying the vacancy by the presentation or nomination of the bishop of the diocese can be supported, extends or not to the present case.

"And upon the first point we are of opinion, that the right of presentation or nomination in question clearly falls within the provisions contained in the 1 & 2 Vict. c. 31., so as to make it unnecessary to consider whether such right does or does not fall within the 139th section of the former act.

"That it was the intention of the legislature to take from municipal corporations, when established upon their new system, all ecclesiastical patronage of every kind and description, and to vest the same in the purchasers

CAPACITY TO
PRESENT AND
BE PRESENTED.

The power of alienating advowsons is granted to municipal corporations, and their right of nomination can be sold.

Effect of the provisions of stat. 5 & 6 Gul. 4. c. 76. s. 139. & stat. 1 & 2 Vict. c. 31. as to the right of presentation to the office of curate or reader.

Judgment of Chief Justice Tindal in *Hine v. Reynolds*.

Intention of the legislature to take away ecclesiastical

CAPACITY TO
PRESENT AND
BE PRESENTED.patronage from
municipal cor-
porations.Judgment of
Chief Justice
Tindal in *Hins
v. Reynolds*.

thereof, appears to be beyond a doubt. The general and comprehensive terms used in the former act, the passing of the second act in order to facilitate the sale of church patronage, which recites the doubt as to the church patronage therein described, and the terms in which such doubt is thereby removed; the entire absence of any supposable ground of distinction between one species of ecclesiastical patronage and another, in respect that some should be taken from them and others left; these circumstances all combine to prove the intention of the legislature to have been the general removal of all ecclesiastical patronage from the hands of municipal corporations; and certainly the particular character and description of the patronage now under consideration, as claimed on the part of the corporation, assuming it to be correctly claimed, namely the right of nominating a curate or reader, for a period as short and limited as they may think fit, with the power to remove him at their own pleasure, would not entitle it to any particular favour, as an exception from the general operation of the statutes.

“ But the question, whether the right of patronage claimed and exercised by the corporation of Bury St. Edmunds does or does not fall within the operation of the statute 1 & 2 Vict. c. 31. will best appear by comparing the description of the patronage contained in that act, with the facts stated in the case. The act recites, ‘that in some instances the manors &c. whereof some municipal corporations are seised, were granted to them with an obligation to nominate, provide, and sustain in certain churches and chapels, able and fit priests, curates, preachers or ministers, for the performance and administration of ecclesiastical duties and rites therein, and for the cure of the souls of the parishioners and inhabitants; and although such corporations have from time to time duly nominated and provided such priests, curates, preachers, or ministers, and paid stipends for their sustenance, and have either provided houses for their residence, or paid allowances in lieu thereof, yet such stipends or allowances have not been fixed or assured by any competent authority; and for want of any regular endowment or augmentation of any such curacies, they have not been perpetual cures, or benefices presentive, and the curates have not become bodies politic and corporate within the meaning of 1 Geo. 1. c. 10., or 36 Geo. 3. c. 3.; by reason whereof doubts have arisen, whether the right of nominating ministers to such churches and chapelries can be sold under the provisions of the recited act.’ Now upon reference to the facts stated in the case, the right claimed and exercised by the corporation of Bury St. Edmunds appears to agree so closely with the recital of the act, that it might almost be supposed that the legislature had shaped the remedy with an express view to this particular case. For by the grant to the corporation of 6 Jac. 1., the alderman and burgesses agreed to pay 8*l*. 10*s*. out of the tithes thereby granted to them, yearly to the use of the curates and ministers of the two parish churches of Bury St. Edmunds, and by the second grant of the 12 Jac. 1., the king, after stating his expectation that the alderman and burgesses of Bury St. Edmunds would provide able and fit ministers and preachers of the word, and other officers of the churches aforesaid necessary, at all times to come, granted to the alderman and burgesses, and their successors, the whole and entire rectories and vicarages of Bury St. Edmunds and the said parish churches of St.

Mary and St. James, and all rights and patronage of the same, and all the tithes both greater and less, and all other rights to the same belonging, to be held by them as freely and fully as the late abbot of the said monastery then lately dissolved, or any of his predecessors, had held the same. Now under these grants, which were accepted by the corporation, there can be no doubt but that the corporation were bound to make a sufficient provision for the cure of the parish in question, and that they had the nomination and appointment of the person or persons who should perform the duty; nor is there any doubt that if they had appointed a person to such cure with a fixed stipend, and irremovable at their own pleasure, he would have been a perpetual curate in the strict legal sense of the word.

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“ It appears, however, from the statement in the case, that they did not make any endowment, or give any fixed stipend to the ministers in either of the churches; nor did they, so far as appears in the case, for a considerable period subsequent to the grants of King James, appoint any one particular person to the cure of either of the churches; but from the year 1652 (the records previous to which year are lost) down to the year 1687, the alderman and burgesses from time to time appointed and provided the ministers necessary; during some part of that time procuring, as they were best able, from Sunday to Sunday, clergymen from Cambridge or elsewhere, and paying them for such their services. So that the corporation, during that early period, appear to have acted precisely in the same manner as the monastery itself before the dissolution had done, except that the corporation procured ministers from other quarters instead of furnishing them out of their own body. Instances of which mode of nomination were probably not unfrequent at an early period after the dissolution of monasteries, as would appear from the case of *Carver v. Pinkney* (1), where a covenant is set out in a lease by the Dean of Lincoln of a certain rectory to the defendant, who covenants with the dean, ‘that he would find or provide a sufficient minister or priest to serve in the church, such as the dean and successors should allow and approve, and would pay the said priest forty marks per annum.’ So that the person or persons provided by the corporation to officiate in the cure of the parish at that time, appears to have been removable or changeable at their will, just as the monk sent to officiate by the monastery was in some instances removable, ‘*ad nutum prioris* ;’ as appears in the case in Cro. Jac. 516. (2) And supposing such right of the corporation to appoint or present continued to be the same up to the time of the Municipal Corporation Act (which the counsel for the defendant contends to have been the case), that is, if there was no fixed stipend payable by the corporation, and the corporation had the power to appoint and remove, the case would fall precisely within the words of the preamble of the statute of Victoria, that tithes were granted to the corporation, with an obligation to nominate able and sufficient ministers; that ministers were nominated and provided by the corporation, and stipends paid by them; but the stipends not having been fixed or allowed by competent authority, and for want of regular endowment of augmentation, the curacies have not become perpetual curacies; and the present case, therefore, would be precisely that which the statute intended to provide for.

(1) 3 Lev. 82.

(2) *Britton v. Wade*.

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“Two objections have been urged on the behalf of the corporation, against the application of the statute to the case before us. In the first place, it is said there was nothing which could be the subject-matter of a sale within the intention of these acts; for there was no certain duration of incumbency in the cure, the appointment being entirely at the will of the corporation, who might displace one curate or reader, and appoint another as they pleased: Admitting this power of amotion to have existed in the corporation, for the purpose of argument, but not conceding it to be a fact in this case, when it appears that the curates have been regularly licensed by the bishop, the effect of which licence it is now unnecessary to enter into; admitting it, however, to exist, still it is difficult to feel the force of the objection. For the corporation are only required by the act to sell such right of nomination or presentation as they actually possess, without any reference to the period for which the nomination or presentation is given. If their right is to present a curate who holds for life, they sell a power of presentation for life; if a curate is removable at will, such will be the presentation that is put up to sale.

“It is objected in the second place, that the right of nomination exercised by the corporation in respect of the parish church of St. James is not a nomination of one incumbent to the church, but of two separate and distinct ministers; viz. a curate or reader, and a preacher or lecturer, each, with a distinct and separate means of support provided for them, the curate, receiving the surplice fees, the preacher having a salary paid to him by the corporation; and it is asserted that two benefices in one and the same parish are unknown to the law of England, and cannot exist together. That there is not, however, any inconsistency in law in the proposition, that two benefices should exist in one and the same parish, is evident from the instance of parson and vicar, who may, under particular circumstances, both have this cure in the same parish, the parson, as it is said, *habitualitèr*, the vicar, *actualitèr* (1); a proposition that is also adopted by the late Lord Stowell in his judgment in the case of the *Duke of Portland v. Bingham*. (2) But, in fact, the objection is one that applies itself rather to the mode in which the ecclesiastical commissioners will deal with the right of patronage and direct the sale, than to the question now before us, which is confined to the right of the ad interim appointment; and so far as is necessary to the present inquiry, it is sufficient for us to say, that the office of curate or reader appears to us to fall within the scope and intention of the statute above referred to, of the 1 & 2 Vict. c. 31.

If the right of nomination fall within stat. 1 & 2 Vict. c. 31. it is within the proviso of stat. 5 & 6 Gul. 4. c. 76. s. 139.

“The second question, therefore, now arises, whether, the case falling within that statute, it is comprehended within the proviso of the 139th section of the former statute, so as to give the bishop of the diocese the power of appointing to a vacancy before the sale. And we think the necessary consequence of holding it within the statute of Victoria is to bring it within the 139th section of the Municipal Corporation Act. And we consider the case the same, as if the descriptive words of the later statute of Victoria had been actually inserted in the 139th section of the

(1) Vide *Britton v. Warle*, Cro. Jac. 517.

(2) 1 Consist. 162.; and as to the diversity, “inter advocacionem medietatis ecclesie, et medietatem advocacionis ecclesie,” vide

1 Inst. 17. (b). 18. (a). *Hollande's case*, 4 Co. 75. *Smith's case*, 10 ibid. 135. (b). *Windsor v. Canterbury (Archbishop of)*, Cro. Eliz. 686.

former act, and had formed part of that section. The doubt expressed in the recital of the statute of 1 & 2 Vict. c. 31., is whether such rights of nomination as are therein described, could be sold under the provisions of the 139th section, one of which very provisions is, the power of interim appointment given to the bishop of the diocese. And when it is argued that by the express words of the statute of Victoria, the curacy does not become a benefice until after the sale, and that this appointment takes place before, it may be answered that the power of appointment in the 139th section is not limited to the case of benefices, but is extended also to the ecclesiastical preferments mentioned in that clause; and that the right of nomination to this curacy is, upon the argument, to be considered as virtually introduced into the clause itself by the later statute.

“For the reasons above given, we think that the right of appointment to the office of curate or reader of the parish church of St. James, in Bury St. Edmunds, became vested in the Bishop of Ely upon the death of the late curate; and that judgment, *relictâ verificatione*, must therefore be entered for the plaintiff for the damages agreed upon between the parties.”

The queen is patroness paramount of all benefices in England, and the right of presenting to such benefices as do not belong to other patrons belongs to her. (1)

The Statute of Supremacy, 1 Eliz. c. 1., restored the power to the Crown to present to all dignities and benefices of archbishoprics and bishoprics during the vacations of their respective sees (2), as well as to all benefices which are possessed by any deans, archdeacons, or incumbents, on their being made bishops; and this right extends not only to such as become void after the seisure of the temporalities, but to all such as shall become void after the death of the bishop, though after actual seisure. (3) For as the spiritualities during the vacation of a bishopric, belong to the dean and chapter of common right, or to some other ecclesiastical person, by prescription or composition, so the temporalities come to the crown as *patronus et protector ecclesiæ*. (4)

A prerogative presentation is not to be considered as a presentation by an elder title, but as arising out of a prerogative right, collateral to the title. It does not operate to defeat, but to suspend the title, and leaves every thing derived out of the title, or in any manner connected with it, in statu quo. It is not a right of patronage, nor a right of eviction, nor an usurpation; it does not supply, but suspends or postpones the turn of the patron or patrons; it is a rightful act, and if there are several patrons, it takes away the right of some, leaves the rest entire, but postpones the turn of all. (5)

Where the queen has an interest in the presentation, as if she be seised in fee of an advowson, and create the incumbent a bishop, she then pre-

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CROWN
(PRESENTATION
BY THE).

Stat. 1 Eliz.
c. 1.
Presentation of
benefices when
sees vacant.

Prerogative
presentations.

Where the
crown has an

(1) Stat. 26 Hen. 8. c. 1. Stat. 1 Eliz. c. 1.

(2) 1 Inst. 90. (b). Bro. Abr. tit. *Presentation*, 10. (b). 13.

(3) 4 Inst. 325. *Basset (Sir R.) v. Gee*, Cro. Eliz. 790. *Wentworth v. Wright*, ibid. 526. *Woodley v. Exeter (Bishop of)*, Cro. Jac. 691. *Colt and Glover v. Coventry (Bishop of)*, Hob. 140. *Trower v. Cailland*, 6 T. R. 439. *Evans v. Ascith*, Noy, 94.

Rex v. London (Bishop of), 2 Salk. 540. *Bingham and Squire's case*, 3 Leon. 151.

(4) 2 Inst. 15.; *vide etiam* stat. 8 Eliz. c. 1., 16 Car. 1. c. 11., 13 Car. 2. c. 12., 31 Geo. 3. c. 32., 9 & 10 Vict. c. 59.

(5) *Cailland v. Trower*, 2 Hen. Black. 333. *The Grocers' Company v. Canterbury (Archbishop of)*, 2 Black. (Sir W.), 770. 3 Wils. 214.

CAPACITY TO
PRESENT AND
BE PRESENTED.interest in the
advowson.Advowsons
created by
statute.Presentation by
the lord
chancellor.Cannot be
removed after
induction.CURTESY
(TENANT BY).
Husband may
present jointly
with his wife,
and after her
death, the right
of presentation
is lodged in
him for his life.

sents as patroness, it being a title precedent to that of her prerogative (1); and regularly, a presentation by the queen ought to show by what title she presents. (2)

Where a new advowson, which has, however, all the incidents and properties of other advowsons, is created by statute, it is subject to the same rules of law and prerogatives of the Crown as an old one. (3)

The lord chancellor, or lord keeper of the great seal for the time being, has a right to present to all benefices appertaining to the queen, of or below the value of twenty pounds in the King's Books of first fruits, according to the valuation in the time of Henry the Eighth; and there is no other difference in the form of a presentation by the queen or chancellor, except that for the most part, the one is mandantes, the other rogantes. (4)

If the chancellor present on a supposition that the benefice is under value, and before induction the queen present, her presentee will be admitted; but after induction, the presentee of the chancellor cannot be removed. (5)

It has been said (6) that the king, if he please, may present to such livings under the value of twenty pounds; it is to be observed, that the claim of the lord chancellor or lord keeper, for the time being, is very ancient; and that nothing appears to have been ever determined, in a judicial way, to the diminution of that ancient right. On the contrary, there is an old writ in the register, which supposes the right to be in him, namely, the writ de primo beneficio ecclesiastico habendo; by which the king requires the chancellor to grant to a particular person the first benefice that shall fall in the gift of the Crown, and that he will accept; and the language of the writ is, *Volumus quod idem A. ad primum beneficium ecclesiasticum (taxationem viginti marcarum excedens) vacaturum, quod ad præsentationem nostram pertinuerit, et quod duxerit acceptandum, præsentetur.* (7)

If a woman have an advowson, or part of an advowson, to her and her heirs, and marry, the husband can not only present jointly with his wife, or in his own name, during the coverture, but also having issue by her, after her death (though the right of patronage, so far as it was in the wife, descends to her heir, and though the wife never presented to it, but died before the church voided), because the right of presenting during the husband's life is lodged in him, as tenant by curtesy, though his wife had but a seisin in law. (8) And if the church, in the case of the husband, were to become void during his life, and he die before the church be filled, yet the heir will not have the turn, but the husband's executor; and if, during the voidance of the church, the wife die, having had no issue, so that the husband is not tenant by curtesy, yet he will have the right of presentation to the void turn. (9)

It is said by Perkins (10), that although the church become void during the coverture, and the wife die after the six months past before any present-

(1) *Rex v. London (Bishop of)*, 1 *Ld. Raym.* 26. 1 *Inst.* 388. (a).

(2) *Com. Dig.* tit. *Eglise* (H. 8.)

(3) *Rex v. London (Bishop of)* 1 *Ld. Raym.* 23. 2 *Salk.* 540. 3 *Lev.* 382.; vide etiam *Cambridge (Chancellor of) v. Wylgrave*, *Hob.* 127.

(4) *Lord Chancellor's case*, *ibid.* 214.

(5) *Ibid.*

(6) *Watson's Clergyman's Law*, 75.

(7) *Gibson's Codex*, 764.

(8) 1 *Inst.* 29. (a). 3 *Cruise's Digest*, 7.

(9) *Watson's Clergyman's Law*, 71, 72. 21 *Hen.* 6. 56. (b).

(10) *S.* 468.

ment by the husband, so that the ordinary presents for lapse to that avoidance, yet the husband shall present to the next avoidance as tenant by the curtesy. Mr. Hargrave (1) has observed on this passage, that such a case is not within Lord Coke's reason for allowing curtesy of an advowson, without a seisin in deed, and that he did not find any authority to support this doctrine besides Mr. Perkins' name. (2)

If, however, a man and his wife join in a presentation to which they have no right, this gains nothing, for the wife is under the command of her husband, and therefore it is the act of the husband. (3)

If a man seised of an advowson take a wife and die, the heir shall have two presentments, and the wife the third; although the husband in his lifetime had granted away the third turn (4); that is, the wife may recover the third presentation as her dower (5), or it may be assigned to her for dower; but without such recovery or assignment, the wife cannot make a title to the advowson, or to any presentation. Or if a manor to which an advowson be appendant, descend to an heir, and he assigns to his mother her dower of the third part of the manor with the appurtenances, she is thereby endowed of the third part of the advowson, and may have the third presentment. (6)

The right of presentation descends by course of inheritance from heir to heir, as lands and tenements; unless the church becomes vacant in the lifetime of the person seised of the advowson in fee (7), when it goes to the executor, because the void turn becomes a chattel. If, however, the patron present and die before his clerk be admitted, and his executor present another, both these presentments are good, and the bishop may receive which of the clerks he pleases. (8)

Where an advowson belonged to a prebendary in right of his prebend, and the church became vacant, and the prebendary died without having presented, the right of presentation belonged to his personal representative. (9)

If the same person be both patron and incumbent, and die, though the presentation is thus severed from the advowson, and vested in the executors, yet the heir presents, as in this case the two titles commence at the same instant, and though the avoidance is vested in the executors, yet the eldest title is preferred, and the advowson descends to the heir. (10)

Nevertheless, if he who is both patron and incumbent devise or give authority by his will to three executors, or to either of them, to present a certain person, this is a good devise; for though the church becomes void by his death, and the will is then to take effect, the presentation resembling, as it is said, a flower fallen, and a thing inactive, and so not grantable; yet the devise is not void, for it had an inception in the lifetime of the testator; and it may be compared to a lease made upon condition that the lessee

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**DOWER
(TENANTS IN).**
If a man be seised of an advowson, and take a wife and die, the heir will have two presentments and the wife a third.

EXECUTORS.

HEIR.

Where same person patron and incumbent dies, the heir presents.

But patron and incumbent may devise the presentation.

(1) 1 Inst. 29. (a). n. (5).

(2) 3 Cruise's Digest, 8.

(3) March, 90. pl. 146.

(4) 1 Inst. 379. (a). Dyer, 35. (b), pl. 31. *Williams v. Lincoln* (Bishop of), 2 Anders, 173.

(5) By stat. 3 & 4 Gul. 4. c. 105. s. 4. "No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will;" but by s. 1. the act does not extend to the dower of any widow married before Jan. 1. 1334.

(6) Watson's Clergyman's Law, 72. 1 Inst. 32. (a), 34. (b), 37.

(7) Doctor and Student, 191. 1 Inst. 368. (a).

(8) Watson's Clergyman's Law, 72. 1 Burn's E. L. 139.

(9) *Rennell v. Lincoln* (Bishop of), 7 B. & C. 113. 8 Bing. 490.

(10) *Holt v. Winchester* (Bishop of), 3 Lev. 47. *Harris (Clerk) v. Austin*, 3 Bulst. 47.

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shall not aliene it in his lifetime; he devises it to another and dies: this devise is no breach of the condition, because it was only begun, but did not take effect, whilst he was living. (1)

In presentative benefices for the void turn of a donative, it descends to the heir. (2)

INFANTS.

A guardian by nurture or in socage cannot present to an advowson, because he can take nothing for it, and, consequently, cannot account for it; for, by the law, he can meddle with nothing that he cannot account for (3), and therefore, according to Lord Coke, the heir in that case shall present, of what age soever. (4)

Lord King is reported to have said (5), "An infant of one or two years old may present at law, then why may they not nominate? Does the putting a mark and seal to a nomination require more discretion than to a presentation? The guardian is supposed to find a fit person, and the bishop to confirm his choice; and if this is permitted in law, why should a court of equity act otherwise in equitable estates?"

However this decision may remove all doubts about the legal right of an infant of the most tender age to present, still it remains to be seen whether the want of discretion would induce a court of equity to control the exercise, where a presentation is obtained from an infant without the concurrence of the guardian. (6)

JOINT TENANTS.

Joint tenants are, where lands are conveyed to two persons or more, jointly; and these must jointly plead and sue, as coparceners must do; but joint tenants have a sole and peculiar quality of survivorship, so as when one of them dies, the survivor or survivors shall have the whole.

Where an advowson is held in joint tenancy, all the joint tenants must concur in the presentation; and if they present several clerks, the bishop may admit which he pleases; or if one only present, unless they all join in the presentation, the ordinary may refuse to admit such presentee, and collate, if they do not agree by the proper period. (7)

**When one joint
tenant presents.**

Nevertheless, if the clerk of the one be admitted and instituted on account of the privity that is between them, this shall not put the other out of possession, since there is an unity of title (8); and, consequently, if the joint tenant who presented, die, this presentment will serve for a title in a suit brought by the survivor. (9)

**Joint tenants
may make
partition to pre-
sent by turns.**

"But joint tenants of an advowson may make partition to present by turns, which will divide the inheritance aliquatenus, and create separate rights; so that the one shall present in the one turn, and the other in the other, which is a sufficient partition; for partition of the profits is a partition of the thing, where the thing and the profits are the same. Indeed, it cannot make two advowsons out of one, but it can create distinct rights to present in the several turns." And in this case each of the parties is said to have *advocationem medietatis ecclesiæ*. (10)

(1) *Snallwood v. Lichfield (Bishop of)*, 1 Leon. 205. *Mirchouse on Advowsons*, 140.

(2) *Ripington v. Tamworth School (Governor of)*, 2 Wils. 159.

(3) 1 Inst. 17. (b). 89. (a). *Shoplane v. Roydler*, Cro. Jac. 98.

(4) 3 Inst. 156.

(5) 3 Cruise's Digest, 19. *Hearle v. Greenbank*, 3 Atk. 710.

(6) 1 Inst. 89. (a), n. 1. *Sherrard v. Harbrough (Lord)*, Ambl. 165. *Shoplane v. Roydler*, Cro. Jac. 99. *Kensley v. Langham*, C. T. T. 143.

(7) 1 Inst. 186. (b). *Degge's P. C.* by Ellis, 19. *Att.-Gen. v. Scott*, 1 Ves. 413.

(8) 1 Inst. 243. (a). 2 Ibid. 365.

(9) 1 Ibid. 186. (b).

(10) *Per Lord Holt in Salisbury (Bishop of) v. Philips*, 1 Ld. Raym. 535.

There is a distinction between *advocationem medietatis ecclesiæ*, et *medietatem advocationis ecclesiæ*. For the advowson of the moiety is when there are several patrons and two several incumbents in one church, the one of the one moiety thereof, and the other of the other moiety, and one part of the church allotted to one, and the other part to the other. (1)

It seems that a deacon, or even a layman, may be presented; but he must be made a priest before he can be instituted. For by stat. 13. & 14. Car. 2. c. 4. none but priests, ordained according to the form and manner by the Book of Common Prayer prescribed, are capable to be admitted to any parsonage, vicarage, benefice, or other ecclesiastical promotion or dignity whatsoever; except only the king's professor of law within the University of Oxford, who may hold the prebend of Shipton, in the cathedral church of Salisbury, although he be but a layman.

Before this act, if a layman were presented, instituted, and inducted (although he might be deprived) (2), he was parson *de facto* (3); because it was not like the presentment, &c. of a woman, whose incapacity was apparent: and acts done by him, while parson, were binding, as marriages, leases, &c. (4)

A lunatic cannot present to a church, nor can his committee; but the lord chancellor, by virtue of the general authority delegated to him by the Crown, presents to all livings whereof lunatics are patrons, whatever the value of them may be. (5)

If a person mortgage an advowson, although the legal right to present is transferred to the mortgagee, yet he cannot present even if the church become vacant, pending a suit by the mortgagee to foreclose.

In *Amhurst v. Dawling* (6), the defendant having mortgaged the manor of Thundersley, to which an advowson was appendant to the plaintiff, who brought the bill to foreclose, the church became void; the defendant moved for an injunction to stay the proceedings in a *quare impedit* brought by the plaintiff, to which the Court said: "Although the defendant Dawling hath no bill, yet being ready and offering to pay the principal, interest, and costs, if the plaintiff will not accept his money, interest shall cease, and an injunction to stay proceedings in the *quare impedit*; for the mortgagee can make no profit by presenting to the church, nor can account for any value in respect thereof, to sink or lessen his debt; and the mortgagee, therefore, in that case, until a foreclosure, is but in the nature of a trustee for the mortgagor." (7)

It is a rule in equity, that though in the case of a mortgage in fee, the legal right of presentation is vested in the mortgagee, yet the Court will interrupt that presentation, and compel the ordinary to institute the clerk of the mortgagor at any time before foreclosure, it not being any part of the profits of the estate. (8)

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LAYMAN OR
DEACON.

LUNATICS.

MORTGAGEE.

Mortgagee can make no profit by presenting to the church, nor can account for any value in respect thereof, to sink or lessen his debt.

The ordinary must institute the clerk of the mortgagor at any time before foreclosure.

(1) 1 Inst. 17. (b). *Smith's case*, 10 Co. 135. (b). *Hollande's case*, 4 ibid. 75. *Windsor v. Canterbury* (Archbishop of), Cro. Eliz. 686.

(2) *Sutton's case*, Cro. Car. 65.

(3) *Colt and Glover v. Coventry* (Bishop of), Hob. 149.

(4) *Costard v. Winder*, Cro. Eliz. 775.

(5) Woodeson's Lectures, 409.

(6) 2 Vern. 401.

(7) And the like order was made between Jory and Cox, where the defendant had an injunction against the plaintiff to stay his presenting to a church, that became vacant pending the suit.

(8) *Gally v. Selby*, 1 Str. 403. 1 Com. 343. *Mirehouse on Advowsons*, 151.

CAPACITY TO
PRESENT AND
BE PRESENTED.

— — — — —
Covenant in the
mortgage deed
that on every
avoidance of the
church the
mortgagee
shall present.

In *Gardiner v. Griffith* (1), it appeared that the plaintiff's father, being possessed of a long term for ninety-nine years of the advowson of Eekington, made a mortgage thereof to the defendant by way of assignment of the term, upon condition to be void on payment of the mortgage money and interest at the end of the year; and there was a covenant in the mortgage deed that on every avoidance of the church the mortgagee should present. Several years after the mortgagor died. It was admitted by the lord chancellor, and by the counsel on both sides, that if there be a mortgage made of a manor, and an advowson appendant, before the mortgage is foreclosed (though the mortgagee be in possession), yet the mortgagor shall present if the church become void; for the presentation is to be presumed to yield no profit, and, consequently, cannot be accounted for, nor go towards satisfaction of the mortgage. But the case was here said to differ, nothing being mortgaged but the advowson; so that the mortgagee could have no other satisfaction than by providing for a child, relation, or friend, on the advowson becoming void; and the rather for that it was the express agreement in the mortgage deed, that as often as the church became void, the mortgagee should present; which express agreement would be good even in a case of a mortgage of a manor with an advowson appendant; and this was still stronger, as it was in the case of a perishing term, where every presentee or incumbent would have an estate for life in the church; to which the Court, though they gave no opinion, yet seemed to incline. But it appearing that this bill against the mortgagee and his presentee was brought seven months after institution, the lord chancellor dismissed the bill, declaring that as a quare impedit was confined to the six months after the death of the last incumbent, so the bill seeking to compel the defendant to resign, and, consequently, to deprive him of his living, ought by the same reason to be limited to the same time; and the relieving against this would be to relieve against an act of parliament, which had been punctually observed for some hundreds of years, ever since the 13 Edw. 1., and that the six months' time ought to be as much observed here as at law, in regard it tendeth to the peace of the church. Indeed, had a quare impedit been brought within the six months, and the bill been preferred after the six months, the Court might, on a proper case, give directions in aid of the quare impedit, that the mortgage should not be given in evidence; but here there was no quare impedit brought, and the bill came out of time. Wherefore, "Dismiss the bill as to that part which seeks to compel the defendant to resign his living; but let the plaintiff redeem the mortgage on payment of principal, interest, and costs." This decree was affirmed on appeal to the House of Lords. (2)

Petition on
behalf of a
mortgagor, that
the mortgagee
of a naked
advowson
shall accept
of his nominee,

In *Mackenzie v. Robinson* (3), a petition was presented on behalf of a mortgagor, that the mortgagee of a naked advowson should accept of his nominee, and present him, upon an avoidance, the incumbent being dead. On behalf of the mortgagee, it was insisted, that as there was a large arrear of interest, he ought to present, if any advantage accrue from it: to which Lord Chancellor Hardwicke observed, "I am of opinion,

(1) 2 P. Wms. 404.

(2) *Mackenzie v. Robinson*, 3 Atk. 559.

(3) Ibid.

that the mortgagor ought to nominate, and that it is not presumed any pecuniary advantage is made of a presentation. To be sure, these are indifferent securities; but the mortgagee should have considered it before he lent his money; and instead of bringing a bill of foreclosure, as he has done in this case, he should have prayed a sale of the advowson." The next day he mentioned "that he was not quite clear as to this point, and that he had looked into the case of *Gardiner v. Griffith*, according to the statement of it in the House of Lords, where the decree of Lord Chancellor King was affirmed. He said that was a mixed case, and that he doubted himself whether a covenant, that the mortgagee should present (as was the case there) was not void, being a stipulation for something more than the principal and interest, and the mortgagee cannot accbunt for the presentation." He adjourned it for further consideration to the next day of petitions; on which day this petition came on again. And the mortgagee not being able to find any precedent in his favour, gave up the point of presenting, and an order was made that the mortgagor should be at liberty to present, and the mortgagee was obliged to accept of the mortgagor's nominee.

In *Attorney-General v. Hesketh* (1), the mortgagee of a manor and advowson was in possession when the mortgagor made a simoniacal presentation of A., who was rejected by the bishop. The mortgagor and mortgagee then joined in presenting B. C., got the title of the crown, and brought an information to remove the mortgagee's title, that it might not be set up at law, which the Court decreed.

The mortgagee of an advowson appendant may pray a sale. (2)

Where a person seised of an advowson is outlawed, and the church becomes vacant while the outlawry is in force, such person is disabled from presenting, and the voidance is forfeited to the Crown. (3)

No person can present himself, yet he may offer himself to the ordinary and pray to be admitted. But the more legal and regular way is, to make over the right to some other before the avoidance. (4)

By stat. 1 G. & M. sess. 1. c. 26. (5) every person who shall refuse or neglect to subscribe the declaration mentioned in that statute, shall be disabled to make any presentation to a benefice, and the chancellor and scholars of the universities of Oxford and Cambridge shall have such presentation. (6)

The trustees of Roman Catholics are disabled from presenting to any benefice under the 4th section; and such trustees, by presenting without giving notice of the avoidance to the vice chancellor of the university to whom the presentation shall belong, within three months after the avoidance, become liable to a penalty of 500*l*.

By stat. 12 Anne, st. ii. c. 14. s. 1. (7) Roman Catholics are disabled from presenting to any benefice, and every such presentation is declared to be void.

CAPACITY TO
PRESENT AND
BE PRESENTED.

and present him,
upon an avoid-
ance, the in-
cumbent being
dead.

Where the
mortgagee of a
manor and
advowson was
in possession
when the mort-
gagor made a
simoniacal pre-
sentation of A.
who was
rejected by the
bishop.

OUTLAWS.

PATRON.

ROMAN
CATHOLICS.
Stat. 1 G. & M.
sess. 1. c. 26.
ss. 2. & 4.

Stat. 12 Anne,
st. ii. c. 14.
s. 1.

(1) 2 Vern. 549.

(2) *Robinson v. Jago*, Bunb. 130. For-
rest, 145.

(3) Cruise's Digest, 24.

(4) Gibson's Codex, 794.

(5) *Vide* stat. 12 Anne, st. ii. c. 14., stat.
1 Geo. 2. c. 17., stat. 10 Geo. 4. c. 7.

(6) The presentation to the livings situ-

ated to the south of the Trent belong to Ox-
ford, and those situated to the north of that
river belong to Cambridge. Cruise's Digest,
24. *in not*.

(7) *Vide* stat. 36 Geo. 3. c. 83., stat.
53 Geo. 3. c. 149., stat. 57 Geo. 3. c. 99.,
stat. 1 & 2 Vict. c. 106., stat. 2 & 3 Vict.
c. 49.

CAPACITY TO
PRESENT AND
BE PRESENTED.Stat. 11 Geo. 2.
c. 17. s. 6.Stat. 3 Jac. 1.
c. 5., 1 G. & M.
sess. 1. c. 26.,
12 Anne, st. ii.
c. 14.TENANTS IN
COMMON.Presentation by
one tenant in
common.

TRUSTEES.

A grant of the
next avoidance
to one without
his privity, is a
resulting trust
for the grantor.

By stat. 11 Geo. 2. c. 17. s. 6. every grant made of any advowson or right of presentation, collation, nomination, or donative to any benefice, by any person professing the Roman Catholic religion, or by any mortgagee or trustee of such person, will be null and void, unless it be for a valuable consideration to a Protestant purchaser. (1)

But stat. 3 Jac. 1. c. 5., stat. 1 G. & M. sess. 1. c. 26., and stat. 12 Anne, st. ii. c. 14. give the right of presentation to the universities only where one sole patron, or where all who are invested with the patronage are incapacitated by professing the Roman Catholic religion. (2)

Consequently, where a Protestant and a Catholic are co-patrons of an advowson, the right of presentation is in the Protestant alone. (3)

Tenants in common are they who have lands by several titles, and not by a joint title, and none of them knoweth his several part, but they occupy and take the profits in common.

As a presentation by one joint tenant injures not the other, so if one tenant in common of an advowson present alone, this does not put the other out of possession, for at the next avoidance they may join in presentment (4); and an agreement between joint tenants of an advowson, that they should be tenants in common, and that each of them should present, amounts to a severance and release, a release being the proper conveyance from one joint tenant to another (5); as if one tenant in common release, it will enure to the benefit of the other. (6)

Where an advowson is vested in trustees, they are joint tenants, and must all join in presentation. In like manner joint tenants and tenants in common must join in any suit; the first, because they are jointly seised, and claim by joint title; the latter out of necessity, because the thing is entire, and they are but as one person. (7) It is said, however, by Lord Hardwicke, in *Seymour v. Bennet* (8), that where there are parceners who cannot agree in one person, the Court of Chancery will direct them to draw lots who shall have the first presentation.

A grant of the next avoidance to one without his privity, is a resulting trust for the grantor, no other trust being declared. (9) Where A., seised in fee, devised his lands and tenements to trustees, to apply part of the rents in augmentation of eight several vicarages, and the church of B. became vacant; it was decreed that the heir of A. should present. (10) Where R. S., rector of B., devised his perpetual advowson of B., with the appurtenances, to G. S., willing and desiring her to sell it to Eton College, and on their refusal, to Trinity College, and on the refusal of both, to any other college in Oxford or Cambridge, being the best purchaser. This was held to be not a resulting trust of the advowson to the heirs of the testator, but a devise of the beneficial interest therein to G. S. with an

(1) *Ibid* stat. 9 & 10 Vict. c. 59.(2) *Edwards v. Exeter (Bishop of)*, 5 Bing. 652. Stephens' Ecclesiastical Statutes, 529, 530. *in not*.(3) *Ibid*.(4) 1 Rol. Abr. *Usurpation* (K), 572. pl. 2.(5) 1 Inst. 193. (b). 200. (b). *Sarum (Bishop of) v. Philips*, 1 Ld. Raym. 535.(6) *Barker v. London (Bishop of)*, 1 Hen. Black. 417.

(7) 1 Inst. 197. (b).

(8) 2 Atk. 482.

(9) *Norfolk (Duke of) v. Browne*, Prec. in Ch. 80.(10) *Kelsey v. Langham*, C. T. T. 143.

injunction only to sell to particular societies, and on an avoidance by the death of the testator, the devisee, and not the heir, was to present. (1)

Where there are several cestui que trusts of a presentation, they must all agree, or there can be no nomination. (2) If trustees have an advowson with directions to present in a certain time, it is directory only, and they may do it afterwards, but they must join in the presentation. General disusage is evidence to lay aside that part of their constitution which arose by consent. (3) Where trustees have a power to elect a vicar, they must all join, or the bishop may refuse their nominee. Election as well as presentation is requisite or the part of the trustees, and they must give notice of their meeting, and if the election be not fair, the Court will not compel all the trustees to join in the presentation. The election in such a case, is a personal trust, and cannot be executed by proxy. (4)

As trustees can take nothing for their own benefit, a general devise to trustees of "all manors, advowsons," &c. and out of the profits, &c. to pay the cestui que trust an annuity for life, does not carry with it a right to present to a living, that not being a thing out of which a profit can be made. Thus in *Sherrard v. Harborough (Lord)* (5), R. devised his manors, advowsons, &c. to pay his son 1000*l.* a year out of the rents and profits, and directed the rest to be laid out and settled; and a living became vacant; it was held that the presentation went to the heir-at-law, as undisposed of.

By a devise of lands, tenements, and hereditaments (subject to a term of eleven years), in trust to receive the rents, issues, and profits from time to time, and to dispose, &c., an advowson in gross passes, and a sale of the next presentation within the term, by direction and for the benefit of the cestuique trust, was established. (6)

Where, by neglect, the number of trustees to present to a living was not filled up at the time of an avoidance, the Court cannot, by an injunction, prevent the effect of a presentation under the legal title of the heir of the surviving trustee without special grounds; but it will direct that the trust shall be properly filled up in future. (7)

Where the trust of an advowson is to present some fit person, such as the inhabitants and parishioners, or the major part of the chiefest and discreetest of them, should nominate, the right of election is in the inhabitants above the age of twenty-one, paying the church and poor rates, and popular election by a majority of such voters and others not so qualified has been established. (8)

There has been also another case where the doctrine of a resulting trust was held not to apply; viz. where the whole estate had been devised away from the heir; and where it was said, that if a person seised of an advowson

CAPACITY TO PRESENT AND BE PRESENTED.

Where there are several cestui que trusts of a presentation, they must all agree.

A general devise to trustees does not carry with it a right to present to a living.

Where, by neglect, the number of trustees to present to a living was not filled up at the time of the avoidance.

Nomination by popular election.

An absolute devise to trustees carries away the nomination from the heir.

(1) *Hill v. London (Bishop of)*, 1 Atk. 618.

(2) *Seymour v. Bennet*, 2 ibid. 482. *Att.-Gen. v. Scott*, 1 Ves. sen. 413. 7 Bro. Parl. Cas. 296.

(3) *Att.-Gen. v. Scott*, 1 Ves. sen. 415.

(4) *Wilson v. Dennison*, Ambl. 82. *Att.-Gen. v. Scott*, 1 Ves. sen. 415. *Rex v. Davie (Sir H.)*, 6 A. & E. 374. *Rex v. Mashiter*, ibid. 153.

(5) Ambl. 165.

(6) *Albermarle (Earl of) v. Rogers*, 2 Ves. 477.

(7) *Att.-Gen. v. Lichfield (Bishop of)*, 5 Ves. 828.

(8) *Fearon v. Webb*, 14 ibid. 13. *Vide Att.-Gen. v. Forster*, 10 ibid. 335. *Att.-Gen. v. Parker*, 3 Atk. 576. 1 Ves. sen. 43. *Hawkins v. Chappel*, 1 Atk. 622. *Rex v. Mashiter*, 6 A. & E. 153. 394., where the principles of election are discussed.

CAPACITY TO
PRESENT AND
BE PRESENTED.CHARITABLE
TRUSTEES.
Stat. 1 & 2 Vict.
c. 31.

be also incumbent and devises it, the devisee, and not the heir, shall nominate after his death. (1)

Charitable trustees are expressly excepted from stat. 1 & 2 Vict. c. 31. for facilitating the sale of church patronage belonging to municipal corporations.

If trustees have the right of presentation only upon the nomination of others, they are, in the case of a donation, to judge of a fitness of the person nominated, as a bishop does, and may absolutely reject on the ground of his being illiterate; but if rejected on the ground of immorality, that can be tried by a jury on a return of the mandamus to the trustees to admit. (2)

Stat. 7 Gul. 4.
& 1 Vict.
c. 26. s. 30.

USURPER.

Presentation by
an usurper
void.

By stat. 7 Gul. 4. & 1 Vict. c. 26. s. 30. a devise to trustees or executors of a presentation to a church, will pass a chattel interest.

If a person present by usurpation to a benefice, by reason of any corrupt contract, the presentation, institution, and induction thereupon are void, for the act extends to all patrons, bodies politic and corporate, as well by wrong as by right (3); so that there is an actual, though there need not be an effectual presentation (4); and not only to benefices with cure, but to dignities, prebends, and all other ecclesiastical livings. (5)

Distinction be-
tween presenta-
tion by an
usurper and a
patron.

There is, however, this difference between a presentation or collation made by a rightful patron and an usurper, that in the case of a rightful patron who corruptly presents or collates, there the king presents; but where one usurps, and corruptly presents or collates, there the king shall not present, but the rightful patron. For the law that gives the king power to present is only intended where the rightful patron is in fault; and where the rightful patron is in no fault, there the corrupt act and wrong of the usurper makes the benefice void, but does not take away the lawful title to present from the rightful patron (6), as it would be hard that an usurper should forfeit the right of another in whom there is no fault.

3. REVOCATION OF PRESENTATIONS.

REVOCATION OF
PRESENTA-
TIONS.The Crown
may revoke its
presentation
before induc-
tion.Revocations in
law.

The Crown may revoke its presentation at any time before induction, notwithstanding letters obtained for admission, institution, and induction. (7)

As there may be a revocation in fact, so there may be a revocation in law; as, where the presentee of the king dies before induction, this is a revocation in law, and the king can present again, though it be the case where he has only one turn, because the king has not the effect of his presentment, or in right of his tenant who dies before the induction of his presentee, although the heir, in whose right the king presents, could not present again. (8)

(1) *Hawkins v. Chappel*, 1 Atk. 622.
1 Burn's F. L. 14. (a).

(2) *Rex v. Stafford (Marquis of)*, 3 T. R. 646.

(3) 1 Inst. 120. (a). *Winchcombe v. Winchester (Bishop of)*, Hob. 167.

(4) 3 Inst. 153.

(5) 1 Ibid. 120. (a).

(6) 3 Ibid. 154.

(7) 1 Ibid. 344. (b).

(8) F. N. B. 34. *Holt's case*, 9 Co. 132.
(b). *Gyles v. Colahil*, Dyer, 360. (b). *Sheffield v. Ratcliffe*, Hob. 339. *Hutchins v. Glover*, Cro. Jac. 453. *Wright v. Norwich (Bishop of)*, 1 Leon. 156.

In the like manner, if the king present to a benefice, and die before his clerk be admitted and instituted, the presentation is revoked in law by his death. (1)

Hence, also, if the chancellor present to a benefice, supposing it to be under value, whereas in truth it was above the value, and thereupon the person presented is admitted and instituted, and before induction the king, being apprised of it, repeals the presentment, and presents one in his own name, this is a good repeal, because the king has a right precedent, and is also deceived in his first grant: the king, indeed, may present the second clerk, although no notice of the repeal was given to the ordinary; for, by the revocation of the first clerk's presentment without notice, the presentment is so absolutely void, that if, after he had got institution and induction thereon, the king were to confirm his title, his confirmation would be also void, and the church still remain open to his presentment (2); for the repeal is effectual before notice, and the giving notice to the ordinary is only to make the ordinary chargeable as a disturber, if he proceed afterwards. (3)

But if the second presentment be obtained by fraud and in deceit of the king, the first presentment remains good; as, if the king present a person who, being refused by the ordinary, brings his action, pending which another gets presented by fraud in deceit of the king, without any mention of the king's pleasure to revoke the first presentation, even though the ordinary institute this last person, and cause him to be inducted, the presentment of the former is not void, nor the church so full but that he may be admitted; for if the second presentation be good, it will enure to a double intent, namely, to take away the action attached, and also a presentment which the law will not tolerate without express words purporting the same. (4)

Presentations, though properly made, may be revoked before admission and institution.

When presentations, though properly made, may be revoked.

It has been said by many of the old writers, that none but the king can revoke a presentation, and that though a layman cannot exactly revoke his presentation, yet he may, *cumulando variare*; that is to say, if he present a second time, the ordinary may choose and admit which of the two clerks he pleases. (5) More recent authorities, however, seem to have settled that, as a presentation vests no right in any one, and, before institution, confers no interest whatever, a lay patron may revoke his presentation, which he clearly cannot do after admission and institution; the church being then full against all but the king, and the parson having *curam animarum*. (6)

By the canon law, a layman may revoke his presentation; but a spiritual person being supposed to be more capable of discerning the sufficiency of the person presented, is not allowed to present a second person after he

(1) Godolphin's Repertorium, 266.

(2) *Bedinfield v. Canterbury* (Archbishop of), Dyer, 292. (b), pl. 1. *Walronel v. Polkarl*, *ibid.* 293. (b), pl. 4. *Green's case*, 6 Co. 29.

(3) 2 Rol. Abr. *Presentment* (Q), 351. pl. 17.

(4) *Green's case*, 6 Co. 29.

(5) *Rogers v. Holled*, 2 Black. (Sir W.), 1039.

(6) *Rex v. Norwich* (Bishop of), Cro. Jac. 385. *Stoke v. Sykes*, Latch, 191. *Stoke v. Stiles*, *ibid.* 253. *Mirehouse on Advowsons*, 157.

**REVOCATION
OF PRESENTA-
TIONS.**

has presented one. Hence, according to Lyndwood (1), *Si duo essent præsentati ab uno, si quidem præsentans esset clericus qui variare non potest, præferri deberet primò præsentatus. Si vero præsentans esset laicus, foret in gratificatione episcopi, quem velit admittere.*

**PRESENTATIONS
HOW MADE.**

4. PRESENTATIONS HOW MADE.

**Must be in
writing.**

Though presentations might have been made formerly as well by parol as by writing, yet, since the Statute of Frauds, 29 Car. 2. c. 3., all presentations must be in writing, in the nature of letters missive to the bishop.

**How a corpo-
ration must
present.**

When a corporation presents, it must be under their common seal, and by the true name of their corporation. (2)

**Evidence of a
presentation.**

Common reputation is not admissible in evidence to prove a presentation, nor was it even when presentations might have been by parol. (3)

**Stamp upon
presentation.**

An instrument not under seal, by which A. agreed with plaintiff to present his nominee to a rectory on the next avoidance, and to furnish an abstract title and to execute a conveyance, does not require an *ad valorem* stamp. (4)

**FORMS OF
PRESENTATION.**

5. FORMS OF PRESENTATION.

Form of the grant of a next presentation by an absolute owner of the advowson : —

This indenture made the — day of — 1847, between A. B. of —, in the county of —, esquire, of the one part, and C. D. of —, in the county of —, gentleman, of the other part: witnesseth that, in consideration of the sum of £ — of lawful money current in the United Kingdom to the said A. B. in hand well and truly paid by the said C. D. at or immediately before the execution of these presents, the receipt of which said sum of £ — the said A. B. doth hereby acknowledge, and of and from the same and every part thereof doth hereby acquit, release, and for ever discharge the said A. B., his executors and administrators: he the said A. B. hath given and granted, and by these presents doth give and grant, unto the said C. D., his executors, administrators, and assigns, all that the turn or right of presentation of or to the rectory and parish church of S., in the county of —, which shall first or next happen after the execution of these presents by him the said A. B.: to have and to hold the said first or next turn or right of presentation so happening as aforesaid unto the said C. D., his executors, administrators, and assigns, to and for his and their proper use and benefit. And &c. [covenants by the grantor for his title to the advowson and his right to grant the next presentation — for the grantee's quiet enjoyment of the next presentation and “presenting to the

(1) Prov. Const. Ang. 215.

(2) *Ayray v. Lorelas* (Sir R.), 1 Bulst. 91.; vide etiam *Stafford (Mayor and Burghesses of) v. Bolton*, 1 B. & P. 40. *Att.-Gen. v. Rye (Mayor of)*, 7 Taunt. 551. 1 Stephens on Corporations, 165. 2d ed.

(3) *Rex v. Eriswell (Inhabitants of)*, 3 T. R. 722. *Tillard v. Shebbeare*, 2 Wils. 366.

(4) *Wilmot v. Wilkinson*, 6 B. & C. 506. 9 D. & R. 620.

said rectory and parish church of S. when the same shall first or next become vacant after the execution of these presents by him the said A. B." FORMS OF PRESENTATION.
 — for freedom from incumbrances — and for further assurance of the next presentation — to all which the covenants in the form of the grant of an advowson (given ante, 11.), may be easily adapted.] *In witness, &c.*

Form of the grant of a next presentation by an owner for life of the advowson: —

*[This indenture made, &c. witnesseth that, &c. he the said A. B. hath given and granted, and by these presents doth give and grant, unto the said C. D., his executors, administrators, and assigns, all that the first or next turn or right of presentation of or to the rectory and parish church of S. in the county of —, when the same shall become void by the death, resignation, or deprivation of P., the present incumbent thereof, or otherwise howsoever, in case such avoidance shall happen during the life of him, the said A. B.] or [all that the turn or right of presentation of or to the rectory and parish church of S., in the county of —, which, if the said parish church shall become vacant in the lifetime of him the said A. B., shall first or next happen after the execution of these presents by him the said A. B.] [to have and to hold the said first or next turn or right of presentation hereinbefore granted or intended so to be] or [the said first or next turn or right of presentation so happening during the life of the said A. B. as aforesaid] unto the said C. D., his executors, administrators and assigns, to and for his and their proper use and benefit. And &c. [covenants by the grantor for his right to grant the next presentation, — &c. (1)] or these covenants, after that for the right to grant, may be varied into [and that the said C. D., his executors, administrators, or assigns, shall or may, immediately after the said rectory and parish church shall become vacant by the death, resignation, or deprivation of the said P. or otherwise, in case such vacancy shall happen during the life of the said A. B., lawfully present any person duly qualified according to law to be rector of the said parish church in order to his being instituted and inducted into the same without any the lawful let &c. And that the person so to be presented and inducted shall or may peaceably and quietly hold and enjoy the said rectory and all benefit and profits thereof free and clear &c.] or [which said person so to be presented by the said C. D., his executors, administrators, or assigns, and instituted and inducted as aforesaid, shall or may peaceably and quietly hold and enjoy the said rectory and all benefit and profits thereof without any the lawful let &c. And that free and clear &c.] and for further assurance.] *In witness, &c.**

The following form may likewise be used to exercise the right of presentation: —

[To the most Reverend Father in God, R., by Divine providence Lord Archbishop of Canterbury, Primate of all England and Metropolitan] or, if it be to the other archbishop [To the most Reverend Father in God, R. by Divine providence Lord Archbishop of York, Primate of England] or, if it be to any other bishop [To the right Reverend Father in God, R., by

**FORMS OF
PRESENTATION.**

Divine permission Lord Bishop of —], or to his vicar-general in spirituals, or to any other person having or that shall have sufficient authority in this behalf. I, A. B. of —, the true and undoubted patron of the advowson of the rectory] or [vicarage] and parish church of —, in the county of —, and diocese of —, do hereby present to your lordship and to the said rectory] or [vicarage] of — aforesaid, now become vacant by the death] or [resignation] or otherwise, as the case may be [of Y. Z. clerk, the last incumbent thereof, and to my presentation in full right belonging, my beloved in Christ, C. D. clerk, humbly requesting that your lordship would be graciously pleased to admit and canonically institute him the said C. D. to the said rectory] or [vicarage] and parish church of — aforesaid, and to invest him with all and singular the rights, privileges, members, and appurtenances thereunto belonging, and to cause him to be inducted into the real, actual, and corporeal possession thereof, and to do all other things which to your pastoral office may in this case appertain and belong. In witness whereof, I have hereunto set my hand and seal the — day of — 1847. (1)

PRIVILEGES AND RESTRAINTS OF THE CLERGY.

1. STATUTES RESPECTING THE GENERAL RIGHTS, DUTIES, AND RESPONSIBILITIES OF THE CLERGY IN ENGLAND, pp. 957—959.
2. TEMPORAL OFFICES, p. 960.
3. FREEDOM FROM, AND LIABILITIES TO, TOLLS, p. 960.
4. PRIVILEGE FROM ARREST ON CIVIL PROCESS, pp. 960, 961.
5. APPAREL AND RECREATIONS, p. 961.
6. CANON 75. CLERGYMEN TO SHUN VICIOUS EXCESSES, pp. 961—964.
7. THE CHURCH DISCIPLINE ACT, pp. 964—1003.

If a clerk be charged with any offence against the laws ecclesiastical, the bishop may issue a commission of inquiry — Refusal to bury a corpse without the production of the registrar's certificate under stat. 6 & 7 Gul. 4. c. 86., punishable as an offence against the laws ecclesiastical — Judgment of the Bishop of Exeter IN RE RAWLINGS (CLERK) — A suit may be entertained against a clergyman concerning whom there may exist scandal or evil report, although the scandal, if true, would constitute a criminal offence cognisable solely in a common law court — Judgment of Sir Herbert Jenner Fust in BURDER v. — — Minutes of the resolution of visiting justices respecting the improper conduct of the chaplain to a gaol are not evidence as against the chaplain — What is considered to be a privileged communication to the bishop of the diocese respecting the ill conduct of his

(1) The above forms were settled by my learned friend Mr. Berrey.

clergy — Judgment of Chief Baron Pollock in JAMES (CLERK) v. BOSTON — Notice of the intention to issue a commission under the hand of the bishop — Intimation of the nature of the offence — Bishop should forward every information to the respondent — A citation in a cause of office must show that it is a matter of ecclesiastical cognisance — Proceedings of the commissioners — Counsel have, seemingly, a right to be heard for both parties — Judgment of Dr. Lushington IN RE MONCKTON — The accused has no right to be examined as a witness — Report of the commissioners — Bishop may pronounce sentence, by consent, without further proceedings — Articles and depositions to be filed — Service of copy of the articles on the party — Bishop may require the party to appear before him, and may pronounce judgment on admission — How notice and requisition to be served — Proceedings on a hearing before the bishop — Sentence of bishop to be effectual in law — Bishop may send the cause to the court of appeal of the province — Bishop can issue letters of request, although he may have given notice of issuing a commission under stat. 3 & 4 Vict. c. 86. — Commissioners bound to confine their inquiry within the diocese of the bishop who issues the commission — Judgment of Sir Herbert Jenner Fust in HOMER v. JONES — Mode of signing letters of request under stat. 6 & 7 Vict. c. 62. — Judgment of Sir Herbert Jenner Fust in BROOKES v. CRESSWELL — Bishop empowered to inhibit party accused from performing services of the church, &c. — Archbishops and bishops, members of the privy council, to be members of the judicial committee on all appeals under the act — Attendance of witnesses and production of papers, &c. — Judgment of Sir Herbert Jenner Fust in FARNALL v. CRAIG — Witnesses to be examined on oath, and to be liable to punishment for perjury — Provisions of act not to interfere with persons instituting suits to establish a civil right — Suits to be commenced within two years after the commission of the offence — Judgment of Sir Herbert Jenner Fust in TITCHMARSH v. CHAPMAN — When refusals constitute distinct offences and a breach of the canon law, and not simply a misconstruction of stat. 3 & 4 Vict. c. 86. — The commencement of the proceedings is to be dated, not from the time the citation was extracted, but from the time of its service upon the party — SANDYS' CASE — Entry of the sentence of degradation in the book of acts of the Consistorial Court is sufficient proof of the fact of the degradation of a clergyman — If a sentence of a Spiritual Court be put in as evidence, the proceedings upon which the sentence is founded should also be produced — Proviso of stat. 27 Geo. 3. c. 44, not to apply to suits against spiritual persons for certain offences — Power of archbishops and bishops as to exempt or peculiar places or preferments — Where a criminal proceeding cannot be otherwise instituted than as directed by stat. 3 & 4 Vict. c. 86. — Judgment of Lord Denman IN RE YORK (DEAN OF) — If a visitor examine the proofs of an ecclesiastical offence committed by a clerk for the purpose of punishment, a criminal proceeding is instituted — The courts have no right to look at the reports of commissioners for the direct purpose of construing statutes founded upon them which must speak for themselves — If a bishop be patron of the preferment held by accused party, such bishop to act in his stead — Saving of archbishops' and bishops' powers.

8. TEMPORAL PROCEEDINGS FOR NEGLECT OF CLERICAL DUTIES, pp. 1003—1005.

9. PERFORMANCE OF ECCLESIASTICAL DUTIES, IN AN UNCONSECRATED CHAPEL OR BUILDING, WITHOUT EPISCOPAL LICENCE OR AUTHORITY, pp. 1005—1008.

10. FARMING AND TRAFFICKING, pp. 1008—1012.

1. STATUTES RESPECTING THE GENERAL RIGHTS, DUTIES, AND RESPONSIBILITIES OF THE CLERGY IN ENGLAND.

The following is a tabular statement of the principal statutes enacted since A. D. 1800, which apply to the general rights, duties, and responsibilities of the clergy in England:—

Ages of persons admitted into deacons' and priests' orders, enforcing the due observance of the canons and rubric respecting -	} 44 Geo. 3. c. 43.
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U. K.

STATUTES RESPECTING THE GENERAL RIGHTS, DUTIES, AND RESPONSIBILITIES OF THE CLERGY IN ENGLAND.

STATUTES RESPECTING THE GENERAL RIGHTS, DUTIES, AND RESPONSIBILITIES OF THE CLERGY IN ENGLAND.

Arrest of a clergyman when performing, going to perform, or returning from performing divine service, punishment for	9 Geo. 4. c. 31. s. 23.	E.
Augmentations of small vicarages and curacies by ecclesiastical persons, &c., extending the provisions of 29 Car. 2. c. 8. for confirming and perpetuating	1 & 2 Gul. 4. c. 45. 1 & 2 Vict. c. 107. s. 14. 3 & 4 Vict. c. 113. s. 76. 4 & 5 Vict. c. 39. s. 26.	E.
Avoidance of benefices by incumbents accepting augmented curacies, suspending an act of 36 Geo. 3. c. 83. relating to	47 Geo. 3. sess. 2. c. 75.]	E.
Repealed by	48 Geo. 3. c. 5.	E.
Benefices, securing, in certain cases, spiritual persons in the possession of	59 Geo. 3. c. 40.	E.
Benefit of clergy, defining the rights of convicts after having been punished for clergyable offences; placing clerks in orders on the same footing with other persons, as to felonies; and limiting the effect of	6 Geo. 4. c. 25.	E.
Repealing statutes relative to	7 & 8 Geo. 4. cc. 27, 28, & 29.	E.
Colonies, permitting the archbishops and the bishop of London to ordain persons specially for the	59 Geo. 3. c. 60.	E.
making regulations respecting bishops and clergy, other than those of the united Church of England and Ireland	3 & 4 Vict. c. 33.	U. K. & U.S.A.
Curates, granting 8000 <i>l.</i> for the present relief of	44 Geo. 3. c. 2.	E.
for the further support and maintenance of stipendiary	53 Geo. 3. c. 149.	E.
Amended by	54 Geo. 3. c. 175. s. 11.	E.
Repealed, and other provisions made by	57 Geo. 3. c. 99.	E.
Which was repealed and other provisions made by	1 & 2 Vict. c. 106.	E.
Gaols and houses of correction, providing clergy for	55 Geo. 3. c. 48.	E.
Amended by	58 Geo. 3. c. 32.	E.
Repealed, and other provisions made by	4 Geo. 4. c. 64. 2 & 3 Vict. c. 56.	E.
Holy orders, persons in, disqualified to sit in parliament	41 Geo. 3. c. 63.	U. K.
Holy orders, enforcing the due observance of the canons and rubric respecting the ages of persons admitted into deacons' and priests' orders	44 Geo. 3. c. 43.	U. K.
clergy to be ordained specially for the colonies by the Archbishops of Canterbury and York, and Bishop of London	59 Geo. 3. c. 60.	U. K.
regulations in respect to bishops and clergy, other than those of the united Church of England and Ireland	3 & 4 Vict. c. 33.	U. K. & U.S.A.
Holy Trinity, relieving from certain penalties persons who impugn the doctrine of	53 Geo. 3. c. 160.	G. B.
Extended to Ireland by	57 Geo. 3. c. 70.	I.
House of Commons, removing doubts as to eligibility of persons in holy orders to sit in	41 Geo. 3. c. 63.	U. K.
Houses and glebe lands, spiritual persons enabled to exchange parsonage	55 Geo. 3. c. 147.	E.
Amended by	56 Geo. 3. c. 52. 1 Geo. 4. c. 6. 6 Geo. 4. c. 8. 7 Geo. 4. c. 66.	E.
relieving incumbents of livings or benefices mortgaged for providing	5 Geo. 4. c. 89.	E.
amending the law for providing fit houses for the beneficed clergy	1 & 2 Vict. c. 23.	E.
Amended by	1 & 2 Vict. c. 29. 2 & 3 Vict. c. 49. ss. 14, 17.	E.
Land tax, small livings exonerated from	46 Geo. 3. c. 133.	G. B.
Amended by	49 Geo. 3. c. 67. 50 Geo. 3. c. 58.	G. B.
other small livings exonerated from	53 Geo. 3. c. 123.	G. B.
renewing powers of exoneration	57 Geo. 3. c. 100.	G. B.

Penalties, relieving spiritual persons and patrons from, and rendering valid certain resignation bonds	7 & 8 Geo. 4. c. 25.	E.
Pluralities of livings, staying proceedings for	41 Geo. 3. c. 102.	E.
Continued by	42 Geo. 3. cc. 30. & 86.	
	43 Geo. 3. c. 34. expired.	
Plurality, abridging the holding of benefices in	1 & 2 Vict. c. 106.	E.
Queen Anne's Bounty, making more effectual, and enlarging the powers	43 Geo. 3. c. 107.	E.
	45 Geo. 3. c. 84.	
	7 Geo. 4. c. 66.	
See further	2 & 3 Vict. c. 49.	
	3 & 4 Vict. c. 20. s. 5.	
	3 & 4 Vict. c. 60.	E.
Residence, staying proceedings for non-residence until 25th of March, 1802	41 Geo. 3. c. 102.	
Continued by	42 Geo. 3. cc. 30. & 86.	
	43 Geo. 3. c. 34. expired.	E.
amending laws relating to spiritual persons holding farms, and for enforcing residence	43 Geo. 3. c. 84.	
Amended by	43 Geo. 3. c. 109.	
	54 Geo. 3. c. 175.	
Repealed, and other provisions made by	57 Geo. 3. c. 99.	
Which was repealed and other provisions made by	1 & 2 Vict. c. 106.	E.
staying proceedings in actions for non-residence under 43 Geo. 3. c. 84.	54 Geo. 3. c. 6.	
Continued by	54 Geo. 3. cc. 44. 54. expired.	
preventing vexatious suits under 43 Geo. 3. c. 84. for non-residence	54 Geo. 3. c. 54.	E.
explaining and amending act relating to spiritual persons holding farms, and for enforcing residence for one year	54 Geo. 3. c. 175.	E.
Continued until 5th April, 1817, by	56 Geo. 3. cc. 6. & 123.	
consolidating and amending laws relating to spiritual persons holding farms, and for enforcing residence	57 Geo. 3. c. 99.	E.
Repealed, and other provisions made by	1 & 2 Vict. c. 106.	
rendering acts more effectual for promoting residence, by providing houses, &c. for benefices	7 Geo. 4. c. 66.	E.
	1 & 2 Vict. c. 106.	E.
	2 & 3 Vict. c. 49.	
	3 & 4 Vict. c. 20. s. 5.	
	3 & 4 Vict. c. 60. s. 21.	
	3 & 4 Vict. c. 86. s. 2.	
	3 & 4 Vict. c. 113. s. 34.	
	4 & 5 Vict. c. 39. ss. 9, 10. 23 & 24.	
	5 & 6 Vict. c. 26.	U. K.
Riding-horse, granting exemption from duty for one	41 Geo. 3. c. 40.	
Repealed by	43 Geo. 3. c. 161.	
Provisions now in force	4 & 5 Gul. 4. c. 73.	

STATUTES RESPECTING THE GENERAL RIGHTS, DUTIES, AND RESPONSIBILITIES OF THE CLERGY IN ENGLAND.

TEMPORAL
OFFICES.

2. TEMPORAL OFFICES.

"The common law, to the intent that ecclesiastical persons might the better discharge their duty in celebration of divine service, and not be entangled with temporal business, hath provided, that if any of them be chosen to any temporal office, he may have his writ, *de clerico infra sacros ordines constituto non eligendo in officium*, &c. and thereof be discharged." (1)

If a man hold lands or tenements, by reason whereof he ought to serve in a temporal office, yet if he be made an ecclesiastical person within holy orders, he ought not to be elected to any such office; and if he be, he may have the king's writ for his discharge (2): notwithstanding that it be an office which he may execute by deputy. (3)

The kings of England have always asserted and exercised a right to employ what subjects they pleased, of the clergy as well as laity, in any post of civil government (4): thus, many clergymen have been chancellors, treasurers, and even chief justices of the King's Bench, and consequently must have acted as judges in cases of life and death.

Not bound to
appear at the
tourn or leet.

By stat. 52 Hen. 3. c. 10. religious men and women were exempted from the tourns of sheriffs (5); and consequently were not bound to appear at the leet or view of frankpledge. (6)

Exempted
from serving on
juries.

By stat. 6 Geo. 4. c. 50. s. 2. clergymen in holy orders have been exempted from serving upon juries. (7)

FREEDOM FROM,
AND LIABILITIES TO, TOLLS.

3. FREEDOM FROM, AND LIABILITIES TO, TOLLS.

Amongst the Saxons, the lands of the clergy were charged to castles and bridges, and expeditions, but after the introduction of the Romish canon law they obtained exemptions.

Anciently, clergymen were not burdened in the general charges with the laity of the realm, unless specially named and expressly charged by statute. (8) But the contrary doctrine now prevails, and clergymen are liable to all charges by act of parliament, unless they are specially released. (9)

The clergy are exempted from paying toll at turnpike gates when on parochial duty. (10)

PRIVILEGE
FROM ARREST
ON CIVIL
PROCESS.

4. PRIVILEGE FROM ARREST ON CIVIL PROCESS.

Stat. 9 Geo. 4.
c. 31. s. 23.

By stat. 9 Geo. 4. c. 31. s. 23., "if any person shall arrest any clergyman upon any civil process while he shall be performing divine service, or shall,

(1) 1 Inst. 95.

(2) 2 Ibid. 3.

(3) *Dartford (Case of the Vicar of)*, 2 Str. 1107.

(4) 2 Rol. Abr. *Prærogative le Roi* (Q), 221. pl. 2.

(5) As to be a witness or the like. 2 Inst. 121.

(6) Ibid. 4. Merewether and Stephens' *Hist. of Berceghs*, 102. 435. 439.

(7) Vide *Beccher's case*, 4 Leon. 190.

(8) 2 Inst. 3. Goldolphin's *Repertorium* 194.

(9) *Web v. Bachelior*, 3 Keb. 476. 1 Vent. 273. 2 Lev. 179. Watson's *Clergyman's Law*, 423. 2 Inst. 734.

(10) Vide stat. 3 Geo. 4. c. 125. s. 32 & 33.

with the knowledge of such person, be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanour, and being convicted thereof, shall suffer such punishment, by fine or imprisonment, or by both, as the Court shall award."

PRIVILEGE
FROM ARREST
IN CIVIL
PROCESS.

5. APPAREL AND RECREATIONS.

APPAREL AND
RECREATIONS.

The canonical habit, properly speaking, is that which is enjoined by the canons of the church. But in a matter so fluctuating as that of dress, it is impossible to lay down rules for apparel in one age which will not appear ridiculous in the next. Under such circumstances the general rule can only be, that clergymen ought to appear in such habit and dress as shall comport with gravity and decency, without effeminacy or affectation. (1)

It has been stated (2) that, "by the common law of the land, clergymen may use reasonable recreations, in order to make them fitter for the performance of their duty and office.

"And albeit spiritual persons are prohibited, by the canon law, to hunt, yet by the common law they may use the recreation of hunting. And after the decease of every archbishop and bishop (amongst other things) the king, time out of mind, hath had his kennel of hounds, or a composition for the same." (3)

6. CANON 75.—CLERGYMEN TO SHUN VICIOUS EXCESSES.

CANON 75. "
CLERGYMEN TO
SHUN VICIOUS
EXCESSES.

By canon 75. "no ecclesiastical persons shall at any time other than for their honest necessities (4), resort to any tavern or ale houses, neither shall they board or lodge in any such places. Furthermore, they shall not give themselves to any base or servile labour, or to drinking, or riot, spending their time idly by day or by night, playing at dice, cards, or tables, or any other unlawful game. But at all times convenient they shall hear or read somewhat of the Holy Scriptures, or shall occupy themselves with some other honest study or exercise, always doing the things which shall appertain to honesty, and endeavouring to profit the church of God, having always in mind that they ought to excel all others in purity of life, and should be examples to the people to live well and christianly, under pain of ecclesiastical censures, to be inflicted with severity, according to the qualities of their offences." (5)

(1) Most of the peculiar habits, in the church, in the courts of justice, and in the universities, were formerly the common habit of the nation, but have been retained by persons occupying places of importance, as having an air of antiquity, and thereby conducing to attract veneration.

(2) 3 Burn's E. L. 357.

(3) Ibid.

(4) *Other than for their honest necessities:*
—This was an ancient law of the Church

of England, enacted in the council of Westminster, 1175, and transferred from the third council of Carthage. (Spel. v. 2. p. 104.) Clerici in sacris ordinibus constituti, edendi vel bibendi causa tabernas non ingrediantur, nec publicis potationibus inter sint, nisi peregrinationis necessitate compulsi. Si quis verò tale quid fecerit, aut cesset, aut deponatur.

(5) It may not perhaps be inexpedient to cite the following rules of the canon law, concerning the regularity of the clergy, and

CANON 75.
CLERGYMEN TO
SHUN VICIOUS
EXCESSES.

Drunkenness,
and indecent
conduct, de-
meanour, and
language.

In *Burder v. Speer* (1), which was a cause of office promoted by Mr. Burder, secretary to the Bishop of Winchester, against the Reverend Wilfred Speer, perpetual curate of Thames Ditton, Surrey, "for being an habitual drunkard, and for having been repeatedly guilty of the crime of drunkenness; and also for having been frequently guilty of indecent conduct, demeanour, and language, in the church of the perpetual curacy, as well in and during the performance of divine offices and services in the church as before and after the performance of such divine services and offices.

the punishments to be inflicted for irregularity.

Ill fame:—Presbyter, si à plebe sibi commissa, mala opinione infamatus fuerit, et episcopus legitimis testibus approbare non potuerit, suspendatur usque ad dignam satisfactionem, ne populus fidelium in eo scandalum patiatur. Digna verò satisfactio est (sicut à majoribus constitutum esse docetur) quando sive secundum canones, sive ad arbitrium episcopi septem sibi collegas adjungit, et jurat in sacrosancto evangelio coram posito, quod crimen sibi illatum non perpetravit. Et hac satisfactione purgatus, securè deinceps suum exequatur officium. Caus. 2. q. 5. c. 13.

Presbyter, vel quilibet sacerdos, si à populo accusatus fuerit, et certi non fuerint testes, qui crimini illato approbent veritatem, jusjurandum in medio erit, et illum testem proferat de innocentie sue puritate, cui nuda et aperta sunt omnia. Ibid. c. 5.

Boasting of their wickedness:—Quam sit grave crimen in clericis, cum malè secerint gloriari, nullus sanæ mentis, ignorat. Accepimus sanè, quòd cum P. Descrien, P. filiam suam cuidam I. nomine tradiderit in uxorem, P. diaconus non erubuit publicè confiteri se mulierem prædictam carnaliter cognovisse: unde factum est, quòd vir ad propria eam remitteret, cui fuerat matrimonialiter copulata. Ideoque mandamus, quatenus si tibi constiterit de præmissis, appellatione cessante præfatum clericum officio, et beneficio suspendere non postponas: compellens virum, ut uxorem suam recipiat, eique (sicut justum est) officium adhibeat maritale. Extra. l. 5. t. 31. c. 9.

Fornication:—Si quis episcopus, aut presbyter, aut diaconus post diaconi gradum acceptum fuerit fornicatus, aut mæchatus, deponatur, et ab ecclesia projectus, inter laicos agat penitentiam. Dist. 81. c. 13.

Drunkenness:—A crapula, et ebrietate omnes clerici diligenter abstineant: unde vinum sibi temperent, et se vino: nec ad bibendum quispiam incitetur: cùm ebrietas, et mentis inducat exilium, et libidinis provocet incentivum. Unde illud abusum penitus decernimus abolendum, quo in quibradam partibus ad potus aequales, suo modo se obligant potatores: et ille judicio talium plus laudatur, qui plures inebriat, et calices fœcundiores exhaurit. Si qu' autem

super his se culpabilem exhibuerit, nisi à superiore commonitus satisfecerit, ab officio, vel beneficio suspendatur. Extra. l. 3. t. 1. c. 14.

Feasts of mirth and jollity:—Presbyteri, diaconi, subdiaconi, vel deinceps, quibus ducendi uxores licentia non est, etiam alienarum nuptiarum evitent convivia: nec his cœtibus misceantur, ubi amatoria cantantur: et turpia, aut obsceni motus corporum choreis, et saltationibus efferuntur: ne auditus, aut obtutus sacris mysteriis deputati, turpium spectaculorum, atque verborum contagione polluantur. Dist. 34. c. 19.

Striker:—Si quis in aliquo gradu sacro percussor extiterit, corripitur à crimine: et si se non emendaverit, deponatur. Extra. l. 5. t. 25. c. 1.

Notary:—Sicut te accepimus referente; et infra. Fraternitati tue mandamus, quatenus clericis in sacris ordinibus constitutis, tabellionatus officium, per beneficiorum subtractionem appellatione postposita, interdicas. Extra. l. 3. t. 50. c. 8.

Exercising surgery otherwise than for charity:—Tua nos duxit fraternitas consulendos: et infra. Quærivisti, quid sit de quodam monacho sentiendum, qui credens se quandam mulierem à gutturiis tumore curare, ut chirurgus cum ferro tumorem illum aperuit: et cum tumor aliquantulum resedisset, ipse mulieri præcepit, ne se vento exponeret ullo modo, ne fortè ventus subintrans gutturiis apertionem, sibi causam mortis inferret: sed mulier (ejus mandato contempto) dum messes colligeret, vento se exposuit incautè, et sic per apertionem gutturiis, sanguis multus effluxit, et mulier diem ultimum sic sinivit: Utrum videlicet cum prædictus monachus sit sacerdos, liceat ei sacerdotale officium exercere? Nos igitur fraternitati tue respondemus, quòd licet ipse monachus multum deliquerit alienum officium usurpando, quòd sibi minime congruebat: si tamen causa pietatis, et non cupiditatis id egerit, et peritus erat in exercitio chirurgiæ, omnemque studuit, quam debuit, diligentiam adhibere, non est ex eo, quòd per culpam mulieris contra consilium ejus accidit, adeo reprobandus, quòd non post satisfactionem condignam cum eo misericorditer agi possit, ut divina valeat celebrare; alioquin interdicenda est ei sacerdotilis ordinis executio de rigore. Extra. l. 5. t. 12. c. 19.

(1) 1 Notes of Cases Ecclesiastical, 59.

The suit was brought by letters of request from the commissary of the Bishop of Winchester.

This case involved no subtle principles of law, but was merely a question of evidence, viz. whether the defendant was guilty of drunkenness or not.

Sir Herbert Jenner, *inter alia*, observed, "Upon the whole of the case, I am clearly of opinion that the evidence is sufficient to establish the charges made against Mr. Speer; that if he is not proved to have been, in the strict sense of the term, an habitual drunkard, he is proved to have been frequently guilty of the crime of drunkenness; and it is not necessary, that every article should be proved to its full extent; it is quite sufficient if the ecclesiastical offence be made out distinctly by the evidence taken upon the articles. I am also clearly of opinion, that Mr. Speer is fully proved to have been rendered incapable, from the effect of liquor, of performing the duty of the parish church in a proper and seemly manner; and further, that he has gone the length of performing it in an indecent and irreverent manner, and that the natural consequence has been, the withdrawal of several of the parishioners from attendance at their parish church; and I think if some steps had not been taken to check his proceedings, they must have led to its entire desertion. It is, therefore, due to the attendants at the church, that the Court should pronounce a sentence that shall have the effect of preventing the recurrence of these improper proceedings and exhibitions, and give this gentleman an opportunity to amend his conduct.

"Before I proceed to pronounce that sentence, I will notice certain interrogatories (upon which the Court has been called upon to pronounce its opinion) administered to some of the witnesses examined upon the articles. The object with which I refer to these interrogatories is to point out the impropriety of imputing to witnesses of highly respectable character the charges to which I have adverted, namely, of acting from malice and private revenge, and of entering into a conspiracy against this gentleman, and attempting to support such proceeding by evidence which is false; in fact, of having brought forward these unfounded accusations to asperse his character. Now, I repeat, that a more improbable case of conspiracy can hardly be imagined. I am not prepared to say, that it is not open to a party, if he chose, to impute malice, and resentment, and spite, to individuals by whom he suggests that he is persecuted. I have great difficulty in saying, that the Court ought to prescribe any rule by which counsel should be governed in settling interrogatories, upon such suggestions from their clients, fortified by their strong asseverations of innocence. I feel great difficulty in saying what is the course which should be pursued, as the Court cannot know what the individual circumstances of the case may be; and it must, I am afraid, be left, in each case, to the discretion of counsel—that discretion which they are bound to exercise for the advantage of their client, as well as with respect to the general interest of society. I must leave it to the good taste and discretion of counsel in what cases they will be justified in imputing to witnesses improper motives towards individuals. This Court has not the means of stopping counsel in administering interrogatories, as in a court of law, where questions are put *viva voce*, and where probable proof of a conspiracy, if it exist, may be obtained at the moment. I can only say, that I disapprove of the nature of the interrogatories in this case, because I see that they are without a shadow of foundation in fact.

CANON 75.
CLERGYMEN TO
SHUN VICIOUS
EXCESSES.

Judgment of
Sir Herbert
Jenner in *Bur-*
der v. Speer.

What will be
sufficient evi-
dence to esta-
blish drunken-
ness.

Objectionable
interrogatories
to witnesses.

**CANON 75.
CLERGYMEN TO
SHUN VICIOUS
EXCESSES.**

When a case depends upon charges of conspiracy and perjury against a number of individuals, it always creates a suspicion in the mind of the Court, that the case has no substance or foundation.

What can I say, but that counsel should not lend themselves to attacks upon witnesses, by means of interrogatories which impute improper motives to them, of which there is no proof? I can only express my disapprobation of such interrogatories when they are brought to my notice, and from the facts before me. I have seen in this case, with great regret, that, from assurances given to counsel of innocence of the charges imputed to their client—for they must have been grounded upon those unfounded assurances, and upon statements that there were grounds for imputing the charges to spite and malice—the counsel have been induced to sign these interrogatories. I cannot lay down any rule; I can only express my hope that counsel will govern themselves by what they consider right; for I can assure counsel on both sides, that they can produce no other effect upon my mind than a prejudice against the person by whom these interrogatories are administered, provided they do not show that the persons to whom they are addressed have been actuated by improper motives. Whenever a case is made to depend upon charges of conspiracy, perjury, and subornation of perjury, against a number of individuals, whether in high or low life, it always creates a suspicion in the mind of the Court, that that case has no substance or foundation. I can say no more upon this subject, than to express a hope that counsel will abstain, as far as they possibly can, from putting interrogatories which in substance or language they may consider as conveying imputations upon individuals, in whatever situation those individuals may be.

“With respect to the sentence, I have endeavoured to find, if possible, any circumstances which might justify the Court in passing one less severe than that which it has been accustomed to pass in cases of this description. I have considered whether there is anything from which the Court can suppose that this gentleman has shown any symptoms of contrition; but, unfortunately, I am bound to say that the circumstances show no ground of mitigation. From beginning to end, he has denied the charges; and it is suggested that they are founded in malice, and therefore there is nothing of which he has to repent; as no fault has been committed by him, there is nothing for which he is to express contrition. I am bound, therefore, to pronounce that sentence which the Court has been in the habit of doing in cases of this kind—such a sentence as will give the party opportunity of amendment—namely, suspension for three years. The party will therefore be suspended officially and beneficially for three years; and, as is the usual course, until he produces a certificate, from three beneficed clergymen, that he has been of good conduct during that time; and, as a necessary consequence, I am under the necessity of condemning him in the costs incurred in these proceedings.”

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DISCIPLINE
ACT.**

7. THE CHURCH DISCIPLINE ACT. (1)

Stat. 3 & 4 Vict. c. 86., after reciting that the manner of proceeding in causes for the correction of clerks requires amendment, (2) enacts, that

(1) *Vide tit.* BAPTISM—BRAWLING AND SMITING—BURIAL—DEGRADATION—DEPRIVATION—DILAPIDATIONS—DISPENSATION—EXCOMMUNICATION—MANDAMUS—MARRIAGE—PROHIBITION—PUBLIC WORSHIP—

QUARE IMPEDIT—SEQUESTRATION—SIMONY—SUSPENSION—VISITATION.

(2) In *Sanders v. Head* (3 Curt. 47.), Sir Herbert Jenner Fust gave the following opinion respecting the phraseology

stat. 1 Hen. 7. c. 4., entitled "An Act for bishops to punish priests and other religious men for dishonest lives," shall be repealed. (1)

By stat. 3 & 4 Vict. c. 86. s. 2., "unless it shall otherwise appear from the context, the term 'preferment,' when used in this act, shall be construed to comprehend every deanery, archdeaconry, prebend, canonry, office of minor canon, priest, vicar, or vicar choral in holy orders, and every precentorship, treasurership, sub-deanery, chancellorship of the church, and other dignity and office in any cathedral or collegiate church, and every mastership, wardenship, and fellowship in any collegiate church, and all benefices with cure of souls, comprehending therein all parishes, perpetual curacies, donatives, endowed public chapels, parochial chapelries, and chapelries or districts belonging to or reputed to belong, or annexed or

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Stat. 3 & 4 Vict.
c. 86. s. 2.

of the Church Discipline Act — "Undoubtedly the phraseology of the act is not such as, unless the act had been passed in a hurry, would have been permitted to remain. It is clear, that the same words are used in different senses in different parts of the act: for example, in the 13th section, which directs the bishop to send letters of request to this court, the words 'first instance' are used in a different sense from that in which they are used in the 15th section, for the 15th section enacts, 'that it shall be lawful for any party, who shall think himself aggrieved by the judgment pronounced in the first instance by the bishop, or in the Court of Appeal of the province, to appeal from such judgment, and such appeal shall be to the archbishop, and shall be heard before the judge of the Court of Appeal of the province.' Now, there the words 'first instance' cannot mean the *toties*, but the sentence on the first hearing of the cause. So they are used in the latter part of the same section: 'When the cause shall have been heard and determined in the first instance in the court of the archbishop.' By these words, the same meaning is not intended to be conveyed in the two sections. What I understand by them is, that at any time before the commissioners have proceeded in the inquiry, the bishop may send the case up to be heard elsewhere.

(1) From a return to the House of Commons in 1846, of the number of suits under the Church Discipline Act, it appears that there had up to that period been fourteen suits instituted in the Arches Court of Canterbury, in two of which suits the offences charged were not proved, and two suits remained, on the 17th of March, 1846, undetermined. There was one suit in the diocese of Bath and Wells, seven in the diocese of Exeter, and three in the diocese of Gloucester and Bristol. In the Court of the Bishop of Lincoln preliminary proceedings were only taken in three cases, and the parties accused consented to abide the summary judgment of the bishop. In the Court of the Bishop of Norwich there was

a suit against a clerk for non-residence, and sentence was given against him, on which he appealed; the sentence was confirmed, and an appeal was made to the Privy Council. A like suit was instituted against the same party for eight months' non-residence in his rectory in 1844. In the Arches Court of Canterbury, *William Hawkes Langley* was proved guilty of brawling in the parish church, and suspended *ab officio* for eight months. *Henry Erskine Head*, for publishing a letter in derogation and depraving of the Book of Common Prayer, was suspended *ab officio et beneficio* for three years; *Henry Henslowe*, for refusing to bury a corpse, after notice and warning given, was suspended *ab officio* for three months; *John Hurst*, for profane cursing and swearing, and lewd and indecent conduct and conversation, and adultery, or incontinence, was suspended *ab officio et beneficio* for three years, and until a certificate of good behaviour and morals during suspension, signed by three beneficed clergymen, should be produced and approved of by the Court; *John Jones*, for adultery and fornication, was suspended *ab officio et beneficio* for two years, and until a certificate of good behaviour during suspension, should be produced; *Frederick Oakley*, for having published a pamphlet affirming doctrines contrary to the articles of religion, his licence was revoked, and himself suspended *ab officio* until he retracted his errors; *William Day*, for habitual and excessive drunkenness, and having been convicted of an assault, was suspended *ab officio et beneficio* for three years, and until a certificate should be produced; *Arthur Loftus*, for lewd and indecent conduct and conversation, adultery, fornication, or incontinence, was deprived of his preferment; *Henry Cresswell*, for quarrelling, fighting, and habitually swearing, frequenting public houses, and intoxication, was suspended for eighteen months *ab officio et beneficio*, and until a certificate should be produced of good behaviour; and *Henry Heathcote*, for having been convicted of an assault with an intent to commit an unnatural crime, inhibition from exercise of

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Definition of
the terms
"preferment,"
"bishop,"
"archbishop,"
and "diocese."

Stat. 3 & 4 Vict.
c. 86. s. 3.
If a clerk be
charged with
any offence
against the laws
ecclesiastical,
the bishop may
issue a com-
mission of
inquiry.

Refusal to bury
a corpse with-
out the produc-
tion of the re-
gistrar's certi-
ficate under
stat. 6 & 7
Gul. 4. c. 86.
punishable as

reputed to be annexed to any church or chapel, and every curacy, lecture-ship, readership, chaplaincy, office, or place, which requires the discharge of any spiritual duty, and whether the same be or be not within any exempt or peculiar jurisdiction; and the word 'bishop,' when used in this act, shall be construed to comprehend 'archbishop;' and the word 'diocese,' when used in this act, shall be construed to comprehend all places to which the jurisdiction of any bishop extends, under and for the purposes of stat. 1 & 2 Vict. c. 106.

By stat. 3 & 4 Vict. c. 86. s. 3., "in every case, of any clerk in holy orders of the united Church of England and Ireland, who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, *it shall be lawful* (1) for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit, of his own mere motion to issue a commission under his hand and seal to five persons, of whom one shall be his vicar-general, or an archdeacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report: provided always, that notice of the intention to issue such commission under the hand of the bishop, containing an intimation of the nature of the offence, together with the names, addition, and residence of the party on whose application or motion such commission shall be about to issue, shall be sent by the bishop to the party accused fourteen days at least before such commission shall issue."

Under this section the powers of the bishop to issue a commission of inquiry extend to any offence against "the laws ecclesiastical," which comprehend the statute law, common law, and canon law.

The Rev. W. Rawlings, rector of Lansallos, in Cornwall, having refused to bury a corpse (2), brought to the parish church without production of the registrar's certificate, under stat. 6 & 7 Gul. 4. c. 86. (3); "a commission of inquiry was issued by the Bishop of Exeter, under the Church Discipline Act,

the ministry, and from all discharge of his clerical office. The offences in the diocese of Exeter were for publishing the banns and solemnising a marriage when neither of the parties lived in the parish; for officiating without the licence and against the monition of the bishop; for omitting in the burial service certain parts of the office; and for publicly reading prayers, &c. in an unconsecrated building. In the diocese of Gloucester and Bristol, *Harry Grey* was suspended for three years for frequenting houses of ill-fame and committing fornication; and *George Marcus d'Arcy Irvine*, for celebrating an illegal marriage, was suspended for one year.

(1) *It shall be lawful*:—Under these words it is compulsory on the Bishop in every case of a Clerk in Holy Orders who may be charged with any offence against the Laws Ecclesiastical, &c., on the application of any

party complaining thereof, to issue a Commission in the manner pointed out in this section:—for as a general principle, it may be laid down, that where an authority is to be exercised for the sake of justice or the public good, it is the same as a command; thus, where the administration of justice was concerned, the word "may" has been held to mean the same as the word "shall."—*Rex et Reg. v. Barlow* 2 Salk. 609. *Rex v. Flock-wold Inclosure* (Commissioners of), 2 Chitt. 251. 1 Saund. 57. n. (1). 7 Bac. Ab. tit. Statute I., 451. The bishop may, however, proceed, under sect. 13., but then it will not be compulsory upon him to do so, the words "if he shall think fit," in that section, leaving it discretionary with him to proceed or not under the provisions thereof.

(2) *Vide ante*, tit. BURIAL.

(3) *Ibid.* 202, 203. Stephens' Ecclesiastical Statutes, 1736.

PRIVILEGES AND RESTRAINTS OF THE CLERGY.

and the commissioners having reported that there was *prima facie* ground for further proceedings, and Mr. Rawlings having thereupon submitted to the bishop's judgment, his lordship delivered the following judgment : —

" This is a proceeding (at the mere motion of the bishop) under the act of 3 & 4 Vict. c. 86., intituled " An Act for better enforcing church discipline," against the Rev. W. Rawlings, rector of Lansallos, in the county of Cornwall, for having refused to bury the corpse of Jane Rundell Hutchens, which was brought to the church or church-yard of the said parish to be buried, on Wednesday, the 16th of June, of the present year. (1)

" The commissioners appointed under the statute have reported that there is *prima facie* ground for instituting further proceedings; and Mr. Rawlings having admitted the offence charged against him, and, in accordance with the sixth section of the said act, having consented to the bishop's pronouncing, without further proceedings, such sentence as he shall think fit, not exceeding that which might be pronounced in due course of law, the case may now be finally disposed of, and the heavy charges which could not but ensue from further proceeding in it may thus be avoided.

" There is, too, this additional satisfaction, that in the state to which the matter is brought, the bishop is able to take into consideration any extenuating circumstances which may have been disclosed, and so to award a lighter sentence than would have been possible, if the proceeding had been carried further, and had issued (as it could hardly have failed to issue) in a conviction, for in such a case the 68th canon peremptorily awards suspension from the ministry for three months.

" And here, in the outset, I think it right to state the reason which determined me to order this public proceeding. A great public scandal had arisen from the notorious fact, that a corpse had been interred in the church-yard without the performance of the office of burial by the minister, and with the performance of some rite by other persons.

" Now that any person, other than the minister, should presume to perform any rite whatever in the parish church-yard, is manifestly a very grave offence, not to be justified by the neglect, however grievous, of the minister; still, though not justified, the illegal act might yet have been so far provoked, as might make it more proper to proceed against the minister for his own disregard of his own duty, than to visit the offence, which he had caused, with all the costly proceedings of a suit in the Ecclesiastical Court.

" The facts, admitted from the first by Mr. Rawlings, left me in no doubt that the offence of a person who himself interred the body of his deceased grand-daughter, singing a hymn over the grave, after he had applied to the minister, giving due notice of the time at which the corpse would be brought, and after the minister, being present when the corpse was brought, had refused to perform the office, was not such as demanded all the severity of the law.

" On the other hand, the conduct of Mr. Rawlings, which had caused so grievous a scandal, did appear to render a public investigation indispensable.

" The commissioners, in reporting their judgment, gave permission to Mr. Rawlings to make to me a statement in extenuation of his offence.

" This statement is in substance as follows :— ' That the act of 6 & 7

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an offence
against the
ecclesiastical

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Rawlings
(*Clerk*).

Gul. 4. c. 86., requiring that a certificate of registry of death shall be delivered to the minister, who shall be required to bury a dead body, Mr. Rawlings considered that he had a legal right, even if he was not legally bound, to demand the production of such certificate before he should perform the service; that, under this impression, he has always required the certificate to be produced before he performed the service, and that this his practice was well known to his parishioners, especially to Mr. Jonathan Couch, the grandfather of the deceased, who took on himself the conduct of the funeral. That, on the corpse being brought to the church-yard, he was present in his surplice, and ready to perform the service, but that the usual inquiry for the certificate of registry being made, and the certificate not being produced, he said that he could not legally bury the corpse without it, but requested that a messenger be sent for it, adding that he would wait in his house the return of the messenger.' (This very important particular, I cannot but remark, was not stated by Mr. Rawlings in his previous communication to me, nor does it appear to have accompanied his admission to the commissioners. But the statement proceeds to say) 'that he retired to his house; and being, on the reperusal of the act, satisfied that he might legally bury the corpse without requiring the certificate, he proceeded into the church with the full intention of burying the body; but that as he heard singing in the church-yard, and as a psalm, or hymn, is usually sung in Lansallos after the conclusion of the funeral service, he concluded that the body was already interred, and therefore went away.' He further states 'that one of the marginal notes to the 27th section of the statute misled him;' which note runs in these words, 'No dead body to be buried, without certificate of registry, or of inquest, penalty 10*l.*; adding that 'he acted under an honest but erroneous impression and belief of the duty imposed on him by an act of parliament, the wording of which is so ambiguous as to give ground for the construction placed on it by him.'

"To these last words it is necessary to say something, and the mere production of that part of the statute, which refers to the matter, will suffice. 'Every person who shall bury or perform any funeral or any religious service for the burial of any dead body for which no certificate shall have been duly made and delivered as aforesaid, either by the registrar or coroner, and who shall not within seven days give notice thereof to the registrar, shall forfeit and pay any sum not exceeding 10*l.* for such offence.'

"If these words be deemed ambiguous, I should despair of any others being found clear.

"As to the error of the marginal note, it is enough to say, that they who are content to read their duty in an unauthorised note to a statute, have not much reason to be surprised when they find themselves within the peril of the law.

"Still, looking at the whole matter, it is gratifying to see, that there is very sufficient ground for visiting the offence with much lighter censure than the canon would require.

"The most unpleasant aspect in which the case presents itself, and that which I deem it my duty to impress especially on the attention of Mr. Rawlings, is, the greatly disproportioned anxiety evinced by him to escape

a small pecuniary penalty imposed by a statute, when contrasted with the extreme facility with which he set at nought the requisition of the canon, and of the book of Common Prayer. Surely it is not too much to expect, that when a grave particular of the regular pastoral duty of a minister is in question, such as the burial of a parishioner, he ought not to trust lightly to a marginal note, or even to a cursory reading of words in a statute, which might seem to interfere with that duty.

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“In the present instance, the very slightest examination must have satisfied an ordinary man that the easy requisition of the statute was not in any degree at variance with the plain law of the church.

“Upon the whole, my judgment is, that Mr. Rawlings be admonished, and he is hereby admonished, not to offend in like manner again, and that he pay the costs of this proceeding.”

An Ecclesiastical Court may entertain a suit against a clergyman for the purpose of deprivation or suspension from his ecclesiastical preferment, by reason of a public scandal existing against him, although the scandal originates from a charge which, if true, would constitute a criminal offence cognisable solely in a common law court, and although no conviction by the common law is pleaded. Thus, in the office of the judge promoted by *Burder v. —* (1), which was a cause of office and a proceeding under stat. 3 & 4 Vict. c. 86., and was brought into the Court of Arches by letters of request from the Bishop of —; it appeared by the decree, which had issued in pursuance and on acceptance of these letters, that the reverend gentleman therein named was called on to answer to certain articles, heads, positions, or interrogatories, touching or concerning his deprivation or suspension from his ecclesiastical offices and preferment. The object sought was not *pro salute animæ*, or *pro reformatione morum*; but the Court was asked to pronounce a sentence of suspension, or deprivation of his clerical functions, as against this gentleman.

A suit may
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against a cle
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may exist sc
dal or evil re
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the scandal,
true, would
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cognisable
solely in a co
mon law cou

The articles were given in, and stood for admission; the party cited then undertook to show cause, why he should not be suspended or deprived from the exercise of his ecclesiastical offices and preferments, and so the matter came before the Court. The articles were eighteen in number. In the first place, they set forth that, by the general laws ecclesiastical, all clerks and ministers in holy orders were enjoined to abstain from all immorality, obscenity, and indecency whatever. The second article pleaded that the party cited was a priest or minister in holy orders; and was, in the year, &c., duly elected one of the perpetual priests, vicars choral, or minor canons of the said cathedral church. The third article exhibited the proper instruments of appointment to these offices. The fourth article pleaded that this same party was in the year — licensed by the Bishop of — to perform the office of lecturer in the parish church of &c.; that he entered upon the duties of such lectureship, and had ever since continued to act, and then acted as lecturer to the said church. The fifth article exhibited the episcopal licence. The sixth pleaded that the party was, on &c., duly admitted and instituted to the vicarage of —. The seventh exhibited the usual document in supply of proof. The eighth, that the party was, on &c., duly appointed chaplain to the county gaol. The remaining articles

set forth the charges brought against this gentleman, and detailed the facts and particular circumstances, which were when proved to subject him to deprivation and suspension.

It was urged that these articles were not admissible, because the Court was incompetent to try the charge on which the suit was founded, and was therefore prohibited from entertaining it. That temporal offences, of whatever nature they be, were not examinable in the spiritual courts, which decided on written evidence, and that if the Court had jurisdiction, every archdeacon had the same authority. That the Court of Arches could take no cognisance whatever, either for examining into a charge, or punishing a party if convicted in a temporal court. As regarded a clergyman, the Court of Arches had no jurisdiction to examine into a temporal crime, in the first instance; but that if the party be convicted in a temporal court, there arose out of that conviction a fame or scandal, which the ecclesiastical court might take cognisance of, in order to found a suit for punishing the party by ecclesiastical censures, by suspension, or by deprivation. That the scandal in this latter case arose out of the conviction, not out of the charge; and that the law considered every party charged to be innocent until he be proved guilty, and that the only legal proof of guilt was a conviction by oral evidence in a temporal court. (1)

It was contended by the counsel in support of the articles, that all ecclesiastical jurisdiction might be comprised under three heads: 1st, *ratione privilegii*, or *personæ*; 2d, *ratione causæ*; 3d, *ratione loci*. That, as a general proposition, the amotion or expulsion of a member was incident to a corporation aggregate (2); such privilege being incident to the Established Church, and was exercised by the ecclesiastical courts. That this might be proved, first, by practice (3); and, secondly, by the statutes passed from Edward I. to Henry VIII. relating to the purgation of clerks convict, which were collected in Gibson, pp. 1120—1132. That *Searle's case* (4) was a solitary case, which occurred at a time when the ecclesiastical courts were struggling for their very existence. (5) *Slader v. Smallbrooke* (6) occurred after the Restoration; in that case the Ecclesiastical Court was proceeding to try a forgery, and yet a prohibition was denied; that *Higgon v. Copping* (7) illustrated the principle; so did *Lucy v. Watson (Dr.)*, *Bishop of St. David's* (8), which showed that the bishop might punish his clergy by deprivation or ecclesiastical censures for offences contrary to their ecclesiastical duties and vows. That an indictment at law for an offence of this nature would not lie, if framed in the mode used in the articles: that *Regina v. Rowed* (9), *the Bishop of Clogher's case* (10), and *Free v. Burgoyne* (11),

(1) Vide *Nash v. Nash*, 1 Consist. 140. *Searle's case*, Hob. 121. *Bromley v. Bromley*, Delegates, 1794, cit. in 1 Consist. 141. *not. Slader v. Smallbrooke*, 1 Lev. 138. 1 Sid. 217. *Hart v. Marsh (Clerk)*, 5 A. & L. 602. *Puchet v. Head*, 2 Lee (Sir G.) 565. *Townsend v. Thorpe*, 2 Ld. Raym. 1507. *Mogg v. Mogg*, 2 Add. 292. *Price v. Clark*, 3 Hagg. 271. *Galizard v. Rigault*, 2 Salk. 552.

(2) *Newcombe v. Higgs*, Fitzg. 169.

(3) *Lyndwood*, Prov. Const. Ang. 92. 96. 260. 268. 292. 308. 313. 315.

(4) Hob. 121.

(5) See the conference between Archbishop Bancroft and Lord Coke, 2 Inst. 598.

(6) 1 Lev. 138. 1 Sid. 217.

(7) *Jones (Sir W.)*, 320.

(8) 1 Ld. Raym. 447. 14 St. Tr. 447.

(9) 3 Q. B. 180.

(10) Annual Register for the year 1822.

(11) 5 B. & C. 404. 1 Dow, & C. 115. 2 Bligh, N. S. 65.

had completely established the jurisdiction of the ecclesiastical courts to proceed, in a case of this nature, for the purposes of deprivation of, or suspension from, clerical functions or offices, and that the proceedings were not for punishment, but were brought *diverso intuitu et diversis rationibus*.

Counsel in reply argued, that the case in Levinz's Reports was a proceeding as to which the ecclesiastical courts had undoubted jurisdiction; and that the question of forgery was incidental to the inquiry; therefore, a prohibition was well denied, that it might with equal reason be contended, that the Ecclesiastical Court could not take cognisance of a question of granting probate, because a will was opposed on the ground of forgery, and that the Court had no jurisdiction in the matter. (1)

Upon such facts and arguments Sir Herbert Jenner Fust observed: — "In support of the objection, that the ecclesiastical courts have no jurisdiction in the present case, the Court has been referred to several cases, recording instances, where it has been held that this Court is not at liberty to proceed, for the punishment of offenders, for charges for which they are liable to be proceeded against and convicted in criminal courts, several of these instances being cases against clergymen, or persons holding spiritual or ecclesiastical offices. As a general proposition, this doctrine must be acceded to. The question is, whether, for the purpose for which this suit is brought, this Court has not jurisdiction where the party proceeded against is a clergyman? As against laymen, whatever may be the nature of the charge, undoubtedly the Court has no jurisdiction to entertain a criminal suit; but it is by no means so clear, that, for the purpose of suspension from clerical offices, the Court cannot proceed against a clergyman. The distinction arises from the different object of the proceedings against a layman and a clergyman; and, admitting the general rule, that the Ecclesiastical Court cannot proceed against either a layman or a clerk in orders for the purpose of punishment, the question is, whether, as against the latter person, it may not proceed to try the charge for the purpose of suspending or depriving the offender from clerical duties and preferment?

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Jenner Fust
Burder v.—

"The case of *Free v. Burgoyne* (2), both in the King's Bench and the House of Lords, proceeded on this ground — that the spiritual court had no cognisance of a crime punishable in the temporal courts, except for the purpose of deprivation from ecclesiastical offices. I confess it appears to me to go a great length in support of the proceedings in the present case, which are instituted against this gentleman, not for punishing him for a temporal offence, but to prevent him retaining possession of the ecclesiastical preferment which he now holds.

"I was referred, in the course of the argument, to the *case of the Bishop of Clogher*. (3) I have not a copy of the proceedings in that case, nor have I been able to obtain them; the bishop certainly was outlawed, but still, it was held, that as bishop he was liable to be proceeded against and deprived of his see for the offence imputed to him: the outlawry might have been equivalent to a conviction, and so far this would be a different case. Reference was also made to another case: it was not described by any title, but as a case before the judicial committee, on an appeal from the

(1) *Price v. Clark*, 3 Hagg. 270.

(3) Annual Register for the year 1822.

(2) 5 B. & C. 404. 1 Dow, & C. 115.
2 Bligh, N. S. 65.

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island of Jersey. (1) A writ, in the nature of a writ of prohibition, issued from the Royal Court in that island to the Ecclesiastical Court, whereby that former court annulled certain proceedings in the Ecclesiastical Court, and ordered, that all the acts which referred thereto should be erased from the records of the court. From this last sentence there was an appeal to her majesty in council; and I may here say, that the Royal Court in Jersey corresponds, to some extent, with the Court of Queen's Bench in this country. The judicial committee came to the opinion, that the writ had issued wrongfully, and they reversed it: in the result it was held, that the Ecclesiastical Court in Jersey was at liberty to institute that particular proceeding. When that case was before the judicial committee, I sat as one of the judges, and I pronounced the judgment of their lordships. The case turned on the construction of the canons by which the ecclesiastical law in the island of Jersey is governed, and on one canon in particular, the 17th. It provides, 'that every one of the ministers shall be careful to observe that decency and gravity of apparel which becomes his profession, and may preserve due respect to his person; and they shall be very circumspect in the whole course of their lives, to keep themselves from such company, actions, and haunts as may bring any blame or blemish upon them. Nor shall they dishonour their calling by games, taverns, usuries, trades, or occupations not befitting their functions, but shall study to excel all others in purity of life, gravity, and virtue.' The 22d canon is directed against particular offences, and, amongst them, fornication, and applies equally to the clergy as to the laity. It was held by the Court Royal, that, under this general canon, the Ecclesiastical Court had no power to take cognisance of offences triable in the temporal courts; but the judicial committee held, that, under the 17th canon, and another (the 46th), the Ecclesiastical Court had power to proceed against members of the church and clerks in holy orders, for the purpose of restraining them in such habits of life. The result of the judgment of the Privy Council was to relax the prohibition, and to allow the Ecclesiastical Court in Jersey to proceed.

"That case is somewhat of a similar description with the present, for it was there alleged, 'that rumours of a most serious nature had for some time past been publicly circulated touching the conduct of —; accusing him of leading a most scandalous life, and of having committed indecent as well as criminal acts, to the great scandal of religion, and especially of the Established Church of which he is a minister.'

"That case does seem to me to go the length of declaring, that the Ecclesiastical Court has jurisdiction over clerks in holy orders, for the purpose of deprivation and suspension; although, to a certain extent, that may be punishment; but still punishment is not the object of the proceeding; the object is to remove the party from the office in relation to which he has so misconducted himself. I am of course now considering that the facts charged in these articles may be established in proof; and the Court does not mean to go in detail through these articles; I do not understand them to charge an actual offence, but a series of acts obscene and indecent in themselves. This person was the chaplain of a gaol, and in the course of

(1) Since reported, *nom. The Dean of Jersey v. The Rector of —*, 3 Moore's P. C. Ca. 292.

that duty a person was committed to his care and superintendence; and the charge is that of vicious propensities existing, and to be proved by overt acts. In the case from Jersey it was argued, that as the offence was laid, evidence of actual guilt might be given; but that objection was disallowed, and it was said, it was a proceeding to remove a scandal, and that the possibility of such evidence being given, was no ground for issuing the prohibition. Surely! no clergyman can be suffered to remain in the cure or possession of an ecclesiastical benefice whilst labouring under such an imputation as these articles charge; it may be mere report, but still it is a scandalous report, and it arises out of conduct. I should like to know how parishioners can receive the communion, hear the prayers of the church read, or receive consolation in their dying moments, from a person labouring under such imputations as are here charged? Are his parishioners to receive advice or consolation at the hour of death from this party? Must not the effect, if the Ecclesiastical Court has no jurisdiction to interfere in such a case, be, that the parishioners, from the actual disgust which must arise even from the imputation whilst unrefuted, will abstain from any communication with the party; and, if he be allowed to remain in his benefice, will not the effect be virtually to deprive the parishioners of any of those spiritual offices and benefits which they are entitled to expect and require at the hands of their minister?

"I am, therefore, of opinion, both upon principle and the authority of the cases to which I have referred, that there is no ground whatever for concluding the jurisdiction of this Court; and I consider that this Court has jurisdiction to examine into this case for the purpose of deprivation and suspension; and not only to entertain the suit, but to pronounce a sentence either of suspension or deprivation as may seem meet to this Court, and according to the magnitude of the offence, to be shown by the evidence to be produced against the clergyman against whom these charges are made; provided the charges be substantiated in evidence. I am, therefore, of opinion, that these articles are admissible, and accordingly I admit them to proof."

In *Burder v.* — (1) it was held, that the minutes of the resolution of visiting justices respecting the improper conduct of the chaplain to a gaol were not evidence as against the chaplain; Sir Herbert Jenner Fust stating, "I think, however, that there is one of the concluding articles which is not admissible. This reverend person appears, in addition to his other preferment, to hold the office of chaplain of a gaol; and it is against him, in the discharge of his duties of that office, that this offence is imputed. The article is the seventeenth, and it refers to inquiries made privately by the visiting justices of the gaol; and the conclusion to which they came, namely, that the party should be suspended from his office, whereupon he resigned his appointment; and the article has annexed a paper purporting to be a true copy of the minutes of the resolution of the visiting justices, as entered upon the journals of the gaol. I cannot see how this can be made evidence in any way; I cannot see how, because these justices take upon themselves to inquire into a certain report, and upon the evidence they receive in the course of that investigation, feel bound to exercise the discre-

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DISCIPLINE
ACT.

Judgment of
Sir Herbert
Jenner Fust in
Burder v. —

Minutes of the
resolution of
visiting justices
respecting the
improper con-
duct of the
chaplain to a
gaol are not
evidence as
against the
chaplain.

Judgment of
Sir Herbert
Jenner Fust in
Burder v. —

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DISCIPLINE
ACT.

Judgment of
Sir Herbert
Jenner First in
Burder v. —.

What is con-
sidered to be a
privileged com-
munication to
the bishop of
the diocese re-
specting the ill
conduct of his
clergy.

tionary power reposed in them, and to suspend this party from his office of chaplain, that can be evidence against the party in this cause. With respect to the evidence to be adduced, this is not the time to enter upon a discussion of, or to give any opinion upon, that point; the parties by whom these charges are to be proved, may, as has been said, be persons whose testimony will not be entitled to receive any credit; it may prove so, but the Court cannot determine, *a priori*, whether they are or not competent to give evidence, or whether their testimony will or will not be sufficient."

In *James (Clerk) v. Boston* (1), which was an action for a libel, it appeared that the plaintiff was a clerk in holy orders and officiated at the church of St. James the Great, in the parish of Bethnal Green, in the diocese of London; and that the defendant wrote a letter respecting the plaintiff to the Bishop of London in the following language:—

"Tile Kilns, Hackney Road,
8th January, 1845.

" My Lord Bishop,

" A report is current in the parish of Bethnal Green, and in this neighbourhood, of a most disgraceful scene which occurred in the school-room of St. James the Great, between the Rev. Mr. James, the incumbent, and the schoolmaster, during school hours. Report says, that the schoolmaster asked the rev. gentleman for his salary; words arose; the rev. gentleman collared the schoolmaster, and a stand-up fight ensued. A cry of 'Murder!' was heard from the school, which brought persons to the spot, and after ineffectual attempts of others, the churchwarden parted them. I have troubled your lordship with these reported particulars, that your lordship may institute inquiry. If the transaction is true, it is most shameful: such examples among the clergy, especially among a population like Bethnal Green, are calculated to bring religion into contempt, the church and its ministers into disrepute, instead of implanting right principles into the minds of the rising generation of that long-neglected parish; and it is on that account I deem it my duty (as a churchman) to make my information known to your lordship, if the subject is not so already. I have the honour to remain, with the greatest respect, my lord bishop,

Your lordship's most obliged humble servant,

JAMES BOSTON."

" To the Right Hon. and Right Rev.
the Lord Bishop of London."

" P.S. I trust your lordship will not think this communication impertinent."

It was proved by the Bishop of London that the plaintiff was the incumbent of St. James, Bethnal Green, and that in the month of January, 1845, he received from the defendant the letter set forth in the declaration, and that he knew the defendant's handwriting, from having received letters from him before, respecting which he had seen the defendant. The Bishop of London further stated, that he had sent the letter to the plaintiff, and

had instituted an inquiry into the matter, in consequence of information he had received from another person, and that he should have done so upon this letter only, but that he had not issued any formal commission. His lordship also stated, that complaints under the Church Discipline Act (3 & 4 Vict. c. 86.) were not required to be in any particular form.

Chief Baron Pollock—after having held that the Bishop of London could not be asked the question, whether the result of the inquiry was satisfactory to his lordship; and that whether the letter was a privileged communication or not, was in part a question of fact, which must be left to the jury—said, “The plaintiff in this case is the incumbent of the district of St. James the Great, and this letter was written to the Bishop of London, who is his diocesan. It was written to him as such, and not published to any one else. It is written in the defendant’s own name, and with his correct address, and the bishop knew perfectly well from whom it came. It further appears that the bishop sent the letter to the plaintiff, and directed an inquiry to be made (probably by his chaplains); and I think we may assume, that the result of the inquiry was satisfactory, as no step was taken against the plaintiff, either by commission under the Church Discipline Act, or otherwise. With respect to the letter itself, unless it be protected as a privileged communication, I think it is a libel; and on the question, which is the important one, whether it was a privileged communication or not, you will have to consider whether it was written and sent really and truly with the intention of calling the attention of the Bishop of London to the matter, or from any malicious motives. It may have been the act of a meddling person, a rash man, or an inconsiderate man; but the question for you to consider is this: Was this letter written to the Bishop of London to slander the plaintiff, or was it written to him honestly, to call his attention to a rumour in the parish that was bringing scandal on the church? I am by no means sure, that, before the passing of the Church Discipline Act, this letter, if written and sent to the bishop *bona fide*, would have been a libel; I rather think it would not: but, since the passing of that act, there can be no doubt, that a communication as to the conduct of a clergyman made to his bishop, or such a communication made as to any evil report respecting a clergyman, is privileged. The words of the third section of that act are, ‘that, in every case of any clerk in holy orders of the united Church of England and Ireland, who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist any scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission’ ‘for the purpose of making inquiry as to the grounds of such charge or report.’ It is said that this letter appears to have been maliciously written; but it is for you to determine whether this letter was written with the malicious intention of slandering the plaintiff with the Bishop of London; or was it written, however busily, however mistakenly, with an honest intention of drawing the bishop’s attention to the evil report that existed as to the plaintiff? If it was written and sent under the cloak and mask of causing the institution of an inquiry, but

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DISCIPLINE
ACT.

Judgment of
Chief Baron
Pollock in
James (Clerk)
v. Boston.

Whether a
letter written to
a bishop re-
specting the
conduct of one
of his clergy be
a privileged
communication,
is in part
a question of
fact, which must
be left to a
jury.

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DISCIPLINE
ACT.**

Notice of the
intention to
issue such com-
mission under
the hand of the
bishop.

really from malicious motives, your verdict ought to be for the plaintiff." The jury found a verdict for the defendant.

In reference to the "notice of the intention to issue such commission under the hand of the bishop," Sir Herbert Jenner Fust in *Sanders v. Head* (1) observed:—

"I consider the notice as a preliminary proceeding, in order to institute further proceedings before the commissioners, which further proceedings are themselves only preliminary proceedings. I think, in this case, the notice is not to be considered as part of the proceedings, but merely as preliminary.

"It is stated in the sixteenth section of the act, 'provided always that the archbishop or bishop who shall have issued the commission hereinbefore mentioned in any such case, or who shall have heard any such case, or shall have sent any such case by letters of request to the Court of Appeal of the province, shall not sit as a member of the judicial committee on an appeal in that case.' So that any bishop, or member of the Privy Council, who has issued a commission could not sit; but any bishop who has sent the notice might: there is nothing to prevent him from sitting.

"I consider this as only a preliminary step, to inform the party that proceedings may be issued against him, but as no part of the proceedings whatever. I think this same interpretation applies with reference to the other sections of the act of parliament."

Intimation of
the nature of
the offence.

Doubts have existed whether a general intimation of the offence will be sufficient, or whether time and place ought to be named and adhered to. The inquiry is in every respect preliminary, not final or conclusive; and it seems no greater degree of particularity is positively required, than that which is generally observed in a magisterial summons.

The bishops
should forward
every informa-
tion to the re-
spondents.

But it is respectfully submitted, that, in proceedings under stat. 3 & 4 Vict. c. 86., the bishops are bound, by the principles of impartial justice, to forward every information which they possess to the respondents, fourteen days before the issuing of the commission; and that the appellants should be strictly confined to the charges upon which the commission issued.

A citation in a
cause of office
must show that
it is a matter of
ecclesiastical
cognisance.

In the office of the judge promoted by *Steward v. Francis* (2) it was held, that a citation in a cause of office, must describe sufficiently the offence charged against the party, so as to show that it is a matter of ecclesiastical cognisance; but that it need not minutely specify all the particulars of the offence which are to be charged in the articles.

Stat. 3 & 4
Vict. c. 86.
s. 4.

Proceedings
of the commis-
sioners.

Stat. 3 & 4 Vict. c. 86. s. 4. enacts "that it shall be lawful for the said commissioners, or any three of them, to examine upon oath, or upon solemn affirmation in cases where an affirmation or declaration is allowed by law instead of an oath, which oath or affirmation or declaration respectively shall be administered by them to all witnesses who shall be tendered to them for examination as well by any party alleging the truth of the charge or report as by the party accused, and to all witnesses whom they may deem it necessary to summon for the purpose of fully prosecuting the inquiry, and ascertaining whether there be sufficient *prima facie* ground for instituting further proceedings; and notice of the time when and place where every such meeting of the commissioners shall be holden shall be

(1) 3 Curt. 42. *Vide* tit. PROHIBITION.

(2) *Ibid.* 209.

given in writing under the hand of one of the said commissioners to the party accused seven days at least before the meeting; and it shall be lawful for the party accused, or his agent, to attend the proceedings of the commission, and to examine any of the witnesses; and all such preliminary proceedings shall be public, unless, on the special application of the party accused, the commissioners shall direct that the same, or any part thereof, shall be private; and when such preliminary proceedings, whether public or private, shall have been closed, one of the said commissioners shall, after due consideration of the depositions taken before them, openly and publicly declare the opinion of the majority of the commissioners present at such inquiry, whether there be or be not sufficient *primâ facie* ground for instituting further proceedings."

THE CHURCH
DISCIPLINE
Act.

In re Monckton (1) a question was raised, whether counsel had a right to be heard; upon which Dr. Lushington observed, "I have advised with my brother commissioners on this point, and we are of opinion that, in the wording of the act of parliament, there is a certain degree of doubt as to the intention of the legislature, whether, in a proceeding of this description, counsel should be heard on one side or the other. The words of the act are these: 'and it shall be lawful for the party accused, or his agent, to attend the proceedings of the commission, and to examine any of the witnesses.' So that, according to the words of the act, the party accused, or his agent, may attend and examine witnesses; but not a word is said of his being heard by counsel or agent; and there may be considerable doubt whether it was the intention of the legislature, that counsel should be present; and that doubt is not removed by considering the subject-matter of the act, and the object of the inquiry. For it is clear, that the legislature contemplated not an inquiry that should occupy a great extent of time, or involve a great expense thrown upon the party; for such expense would be unnecessary in a preliminary inquiry like this, which is in the nature of an inquiry before a grand jury, whether or not there be *primâ facie* ground for advising the bishop, if he thought it right to do so, to take proceedings in the matter before another tribunal. But the act in the fourth section authorises the commissioners to examine witnesses tendered by both parties upon oath, and gives power to the commissioners fully to prosecute the inquiry, and ascertain whether there be sufficient *primâ facie* ground for instituting further proceedings. Now, when I first saw the fourth section, a doubt did suggest itself, whether counsel should be present; but I considered that the inquiry would be much more satisfactory, and that it would be an advantage to the commissioners, if we had the presence of counsel. With regard to the present question, we are of opinion that it would be expedient to hear the counsel for Mr. Monckton. If this be an error, it is an error which arises from the statute. But we are further of opinion that, if we do hear counsel on behalf of Mr. Monckton, we undoubtedly ought to hear the counsel for the other party, otherwise we should be contravening the rules of justice: and further, this decision must not be considered of the nature of a judicial precedent; cases may occur in which very great and unnecessary expense might be incurred by persons in the country, being clergymen of the Church of England, whose finances would ill bear the expense of counsel."

Counsel have
seemingly, a
right to be
heard for both
parties.

Judgment of
Dr. Lushington
In re Monckton

(1) 3 Notes of Cases Ecclesiastical, Supp. lxii.

THE CHURCH
DISCIPLINE
ACT.

The accused
has no right to
be examined as
a witness.

Judgment of
Dr. Lushington
In re Monckton.

It was urged *In re Monckton* (1) that the accused had a right to be examined as a witness, if he tendered himself for that purpose: upon which Dr. Lushington said, "After I heard from counsel an intention expressed to examine Mr. Monckton, the question naturally arose, whether or not he was a competent witness? I conceive that this question must be considered in two points of view: first, with respect to the general principles of law, and, secondly, with reference to the particular enactments of the statute.

"With regard to the inquiry itself, it is unquestionably of the nature of a preliminary investigation, to consider whether, under all the circumstances, Mr. Monckton ought to be put on trial before another tribunal, in consequence of sufficient evidence having been here adduced to convince the commissioners that, if such a trial should be had, there would be a reasonable probability of a verdict against Mr. Monckton, and that such verdict could be obtained with justice. I use this expression, for I need not say how much difficulty I had in satisfying my mind respecting the words '*prima facie* ground for instituting further proceedings.' I think it is clear that these words do not mean the reception merely of such evidence as would justify a grand jury in finding a bill, for this obvious and plain reason, that, if that had been the intention of the legislature, the legislature never would, in the preceding part of the section, have directed that evidence should be heard on both sides, and the whole matter fully investigated. Therefore, I conceive our duty to be this: under this preliminary investigation to sift the matter, and see if we are satisfied, on the evidence before us, that there would be a reasonable probability, and not merely a reasonable probability, but with justice, and with a due regard to truth, of a verdict being obtained, if further proceedings were instituted by the bishop before another tribunal.

"Having stated the nature of the inquiry — that it is preliminary, to consider whether or no Mr. Monckton should be put upon trial — I now proceed to consider whether it is proper that Mr. Monckton should be examined on this occasion.

"As far as I am competent to deliver an opinion on the part of my brother commissioners and myself, because of necessity it must mainly rest with me — as far as I can form a judgment from a consideration of the whole principles of the law upon this subject, I apprehend that one of the great principles of the law of England is, that no accused person shall be permitted either to purge himself on his oath, or be compelled to accuse himself. This is the universal rule; and not the rule only, but a principle also, not to encourage perjury, or the extortion of evidence from the accused himself.

"But it is said there is an exception to the rule; and what is the exception mentioned by counsel? He states, as an analogous case, that of an individual going before the Court of Queen's Bench for a criminal information, which he cannot obtain unless he expressly denies upon oath the truth of all the charges. It appears to me that this case is any thing but analogous. In the first place, in that case, the party seeking to prefer a criminal information is the accuser, and not the accused; and the affidavit

(1) i. Notes of Cases Ecclesiastical, Supp. lxx.

is to enable him to obtain a peculiar privilege, instead of being left to the usual course of proceeding by indictment.

“ But it may be, that the act is so worded as to form a clear exception, directly or indirectly, from the general rule, that is, an exception from a great and universal principle. Now it does not appear to me that there is any thing in the 3d section which has any bearing on the point to be determined, for the 3d section, after stating the manner in which the commission shall be appointed, says, ‘ for the purpose of making inquiry as to the grounds of such charge or report ;’ which is too loose to lead to any conclusion, and I must look to the 4th section to see if any thing can be elicited from it. The 4th section empowers the commissioners to examine on oath ‘ all witnesses who shall be tendered to them for examination, as well by any party alleging the truth of the charge or report, as by the party accused, and all witnesses whom they may deem it necessary to summon, for the purpose of fully prosecuting the inquiry.’ What is the meaning of ‘ all witnesses ?’ I apprehend, all witnesses legally competent, and no other; and if Mr. Monckton is incompetent by the ordinary rule of law, to admit his evidence would be acting contrary to the interpretation which the words would ordinarily bear — ‘ tendered as well by any party alleging the truth of the charge or report, as by the party accused.’ So that you may examine all witnesses ‘ tendered by the party accused ;’ but I cannot conceive that the legislature meant to say that the party accused might be one of them. It means simply, that the commissioners are to hear witnesses tendered on both sides, and there is nothing in the expression to induce us to conclude that it was intended that the party accused was to be examined. If such an exception had been intended, I should have expected to see it expressed in words so clear and distinct that there could be no doubt upon the point, or that it resulted by a direct and irresistible inference. But I find neither the one nor the other. And it is impossible to look at the question without a regard to the probable consequences in other cases. Suppose a clergyman charged with an offence, a conviction for which would disgrace and ruin him for ever; there would be the strongest inducement on his part to commit perjury. I cannot conceive any thing more injurious to the cause of sound morality.”

Stat. 3 & 4 Vict. c. 86. s. 5. enacts “ that the said commissioners, or any three of them, shall transmit to the bishop under their hands and seals the depositions of witnesses taken before them, and also a report of the opinion of the majority of the commissioners present at such inquiry, whether or not there be sufficient *prima facie* ground for instituting proceedings against the party accused; and such report shall be filed in the registry of the diocese: and that if the party accused shall hold any preferment in any other diocese or dioceses, the bishop to whom the report shall be made shall transmit a copy thereof, and the depositions, to the bishop or bishops of such other diocese or dioceses; and shall also, upon the application of the party accused, cause to be delivered to such party a copy of the said report and of the depositions, on payment of a reasonable sum for the same, not exceeding two pence for each folio of ninety words.”

Stat. 3 & 4 Vict. c. 86. s. 6. enacts “ that in all cases where proceedings shall have been commenced under this act against any such clerk, it shall be lawful for the bishop of any diocese within which such clerk may hold

THE CHURCH
DISCIPLINE
ACT.

Judgment of
Dr. Lushington
In re Monckton.

Stat. 3 & 4
Vict. c. 36. s. 5.
Report of the
commissioners.

Stat. 3 & 4
Vict. c. 86. s. 6.
Bishop may
pronounce

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—
sentence, by
consent, with-
out further
proceedings.

Stat. 3 & 4
Vict. c. 86. s. 7.
Articles and
depositions to
be filed.

Articles must
be drawn up
from the evi-
dence given
before the com-
missioners.

Stat. 3 & 4
Vict. c. 86. s. 8.
Service of copy
of the articles
on the party.

Stat. 3 & 4
Vict. c. 86. s. 9.
Bishop may
require the
party to appear
before him,
and may pro-
nounce judg-
ment on ad-
mission.

The respondent
has a right
to freedom of
speech in re-
ply to the
articles.

Stat. 3 & 4
Vict. c. 86.
s. 10.
How notice
and requisition
to be served.

Stat. 3 & 4
Vict. c. 86.

any preferment, with the consent of such clerk and of the party complain-
ing, if any, first obtained in writing, to pronounce, without any further pro-
ceedings, such sentence as the said bishop shall think fit, not exceeding the
sentence which might be pronounced in due course of law; and all such
sentences shall be good and effectual in law, as if pronounced after a hearing
according to the provisions of this act, and may be enforced by the like
means."

Stat. 3 & 4 Vict. c. 86. s. 7. enacts "that if the commissioners shall report,
that there is sufficient *prima facie* ground for instituting proceedings,
and if the bishop of any diocese within which the party accused may hold
any preferment, or the party complaining, shall thereupon think fit to pro-
ceed against the party accused, articles shall be drawn up, and when ap-
proved and signed by an advocate practising in Doctors Commons, shall,
together with a copy of the depositions taken by the commissioners, be
filed in the registry of the diocese of such last-mentioned bishop; and any
such party, or any person on his behalf, shall be entitled to inspect without
fee such copies, and to require and have, on demand, from the registrar,
(who is hereby required to deliver the same), copies of such depositions,
on payment of a reasonable sum for the same, not exceeding two pence for
each folio of ninety words."

It seems, that the articles must be exclusively drawn up from the evidence
given before the commissioners.

Stat. 3 & 4 Vict. c. 86. s. 8. enacts "that a copy of the articles so filed shall
be forthwith served upon the party accused, by personally delivering the
same to him, or by leaving the same at the residence house belonging to
any preferment holden by him, or if there be no such house, then at his
usual or last known place of residence; and it shall not be lawful to pro-
ceed upon any such articles until after the expiration of fourteen days after
the day on which such copy shall have been so served."

Stat. 3 & 4 Vict. c. 86. s. 9. enacts "that it shall be lawful for the said
last-mentioned bishop, by writing under his hand, to require the party to
appear, either in person or by his agent duly appointed, as to the said party
may seem fit, before him at any place within the diocese, and at any time
after the expiration of the said fourteen days, and to make answer to the
said articles within such time as to the bishop shall seem reasonable; and if
the party shall appear, and by his answer admit the truth of the articles,
the bishop, or his commissary specially appointed for that purpose, shall
forthwith proceed to pronounce sentence thereupon according to the eccle-
siastical law."

The respondent has the same right of reply, with respect to technical
objections, production of evidence, and freedom of speech, as is practised
by counsel for defendants at *Nisi Prius*.

Stat. 3 & 4 Vict. c. 86. s. 10. enacts "that every notice and requisition to
be given or made in pursuance of this act shall be served on the party to
whom the same respectively relate, in the same manner as is hereby directed
with respect to the service of a copy of the articles on the party accused."

Stat. 3 & 4 Vict. c. 86. s. 11. enacts "that if the party accused shall refuse
or neglect to appear and make answer to the said articles, or shall appear
and make any answer to the said articles other than an unqualified ad-
mission of the truth thereof, the bishop shall proceed to hear the cause

with the assistance of three assessors, to be nominated by the bishop, one of whom shall be an advocate who shall have practised not less than five years in the court of the archbishop of the province, or a serjeant-at-law, or a barrister of not less than seven years standing, and another shall be the dean of his cathedral church, or of one of his cathedral churches, or one of his archdeacons, or his chancellor; and upon the hearing of such cause the bishop shall determine the same, and pronounce sentence thereupon according to the ecclesiastical law."

Stat. 3 & 4 Vict. c. 86. s. 12. enacts "that all sentences which shall be pronounced by any bishop or his commissary, in pursuance of this act, shall be good and effectual in law (1), and such sentences may be enforced by the like means as a sentence pronounced by an ecclesiastical court of competent jurisdiction."

THE CHURCH
DISCIPLINE
ACT.

Proceedings
a hearing
before the
bishop.

Stat. 3 & 4
Vict. c. 86.
s. 12.
Sentence of
bishop to be
effectual in
law.

(1) *All sentences shall be good and effectual in law.*—In *Brookes the younger v. Cresswell* (Arches, Nov. 2. 1847, *ex relat.* the learned reporter of Notes of Cases Ecclesiastical)—which was originally a proceeding against the Rev. Henry Cresswell, vicar of Creech St. Michael, Somerset, for quarrelling and fighting, swearing and using profane and indecent language, frequenting public-houses, and habitually drinking to excess—the Court (February 12, 1846), held, that the articles were sufficiently proved, and sentenced Mr. Cresswell to suspension, *ab officio et à beneficio*, for eighteen months, to commence from and after the date of publication of the sentence, namely, the 8th March, 1846, and further to continue until he should produce a certificate, approved of by the Court, under the hands of three beneficed clergymen in his neighbourhood, that he had properly conducted himself during the period of suspension; and it condemned him in the costs of the proceedings. The costs were taxed on the 10th March, a monition for their payment was decreed and issued on the 26th, and attempts were made to serve it upon Mr. Cresswell, but without success. On the 16th April, 1846, Mr. Brookes, the promoter, died; and on the 16th May, administration of his effects was granted to Elizabeth Hawkes, but no step was taken to enforce the payment of the costs. The period of suspension having expired on the 9th September, 1847, and a certificate from three beneficed clergymen being exhibited on behalf of Mr. Cresswell, it was prayed that the Court would admit the certificate, and relax the suspension. It was argued, that the sentence did not prolong the suspension until the costs had been paid, and that no step had been taken to obtain the costs, by taking out a fresh monition, since the grant of administration of the promoter's effects in May, 1846. To which it was answered, for the administratrix of the promoter, that the condemnation in costs was a part of the sentence, and that the Court could not relax the suspension until its sentence be fully complied with. The certificate was not objected to, but it was urged,

that the three clergymen who had signed it were examined as witnesses in Mr. Cresswell's defence, and the Court did not rely upon their evidence.

Sir Herbert Jenner Fust:—"The period of suspension, to which the Court sentenced Mr. Cresswell, having expired, and a certificate, signed by three beneficed clergymen, having been exhibited, the first question which arises is, Whether the certificate is sufficient? The three clergymen reside in the neighbourhood of Mr. Cresswell, and they certify that, from the 9th March, 1846, to the date of the certificate (the 10th September last), he had resided at his house in the parish of Creech St. Michael, and that, during these eighteen months, he has conducted himself with the propriety and decorum which become a clergyman in holy orders, and that he is, in their opinion, deserving of being restored to the discharge of the functions of his clerical office. Nothing can be more satisfactory than this certificate; that it is a sufficient certificate I have no doubt whatever, and there is no averment to the contrary. It is said that the three clergymen who have signed this certificate were examined as witnesses on the defence of Mr. Cresswell in the principal cause, and it appeared from their evidence that they, at that time, knew very little about him. That was during the pendency of the suit; but there has been an interval of eighteen months since the sentence, during which they have had personal knowledge of his conduct. If I refuse this certificate, I know not what I am to require. I am clear that this is a certificate upon which the Court is bound to act as a sufficient one; and then comes the question, Has Mr. Cresswell complied with the sentence of the Court so far as to entitle him to a relaxation of the suspension? He has not paid the costs,—that is admitted. A monition was taken out, calling upon him to pay the costs, and it appears that attempts were made to serve that monition, which did not succeed. But when? In March and April, 1846, and nothing was done from that time to the present. What was the other party about during all this

THE CHURCH
DISCIPLINE
ACT.

Stat. 3 & 4
Vict. c. 86.
s. 13.

Bishop may
send the cause
to the Court of
Appeal of the
province.

The bishop can
issue letters of
request, al-
though he may
have given
notice of
issuing a com-
mission under
stat. 3 & 4
Vict. c. 86.

Stat. 3 & 4 Vict. c. 86. s. 13. enacts "that it shall be lawful for the bishop of any diocese within which any such clerk shall hold any preferment, or if he hold no preferment then for the bishop of the diocese within which the offence is alleged to have been committed, in any case, if he shall think fit, either in the first instance, or after the commissioners shall have reported that there is sufficient *prima facie* ground for instituting proceedings, and before the filing of the articles, but not afterwards, to send the case by letters of request to the Court of Appeal of the province, to be there heard and determined according to the law and practice of such court: provided always, that the judge of the said court may, and he is hereby authorised and empowered from time to time to make any order or orders of court for the purpose of expediting such suits, or otherwise improving the practice of the said court, and from time to time to alter and revoke the same: provided also, that there shall be no appeal from any interlocutory decree or order not having the force or effect of a definitive sentence, and thereby ending the suit in the Court of Appeal of the province, save by the permission of the judge of such court."

In the office of the judge promoted by *Sanders v. Head* (1) it appeared that the Bishop of Exeter gave notice of his intention of issuing a commission for the purpose of making inquiry as to the grounds of certain charges against a clerk in orders, under stat. 3 & 4 Vict. c. 86. s. 3.; and without withdrawing such notice, his lordship issued letters of request to the Arches Court of Canterbury. It was held, that the letters of request were sent to the Arches in the first instance, as required by stat. 3 & 4 Vict. c. 86. s. 13.; Sir Herbert Jenner Fust, considering the notice as not a commencement of the proceedings, so as to bar the bishop of the right of sending the case to the Court; and that it was not necessary, that the letters of request should contain the name and description of the person on whose application, or at whose mere motion, the case was commenced in the first instance.

This decision was appealed from, but was affirmed by the Judicial Committee of the Privy Council, and the cause remitted to the Arches Court.

time? If it is competent to the party to apply to the Court now, she might have applied at an earlier period. Why was the matter suffered to stand over for eighteen months, and when the period of suspension has expired, and not before, is the Court to be asked to enforce the monition? I am of opinion that Mr. Cresswell has complied with that part of the sentence which required him to produce a satisfactory certificate from three beneficed clergymen as to the manner in which he conducted himself during the period of suspension, and that he is on that ground entitled to have the suspension relaxed. This is a question which has been brought before the Court, I believe, for the first time; but I am of opinion that the Court having directed that Mr. Cresswell should be suspended for eighteen months, and until a certificate should be produced and approved of by the Court, and that period having expired, and a satisfactory certificate having been produced, he is entitled to have the suspension

relaxed, and to be restored to the performance of his ministerial duties. But it is a very different thing to say that he is to be relieved from the obligation to pay the costs. The Court relaxes the suspension, but he is still before the Court; and whether the administratrix of Mr. Brookes, the promoter, may keep him before the Court until the costs be paid is another question. I am of opinion that the Court is bound to relax the suspension, not only upon general principles, but with reference to the circumstances of this case. I therefore direct the suspension to be relaxed, and that Mr. Cresswell be restored to the performance and discharge of the functions of his clerical office from this day."

Counsel then moved for a monition *eris et nudis*. But the judge observed, "I am of opinion that, if you are entitled to any monition at all, it is a monition to show cause why the costs should not be paid to the administratrix."

(1) 11 Curt. 32.

Where, after a commission of inquiry, a case is sent, under stat. 3 & 4 Vict. c. 86. s. 13., to the Court of Appeal of the province by the bishop of the diocese, within which the clerk proceeded against holds preferment, the articles must be confined to offences committed within that diocese; and the commissioners, under the 3d section, are bound to confine their inquiry within the diocese of the bishop who issues the commission.

Thus, in the office of the judge promoted by *Homer v. Jones*(1), which was a question as to the admissibility of certain articles against a clergyman for incontinency, the case was brought before the Court by letters of request from the Bishop of Worcester. The requisite proceedings under the statute had taken place, and the commissioners reported, that there was *prima facie* ground for instituting further proceedings. The articles pleaded several acts of incontinency committed within the diocese of Worcester, but the 6th pleaded an act of adultery committed in the city of Lichfield.

It was contended, in opposition to the articles, that this 6th article was inadmissible under stat. 3 & 4 Vict. c. 86., as it charged a clergyman, holding preferment in one diocese, with the commission of an offence in another; and that the article was not only inadmissible in itself, but that it vitiated the rest of the articles, because the whole of the present proceeding was founded upon the report of the commissioners, and *non constat*, that they did not make their report upon the evidence given in support of this particular charge, into which they had no business to have inquired. But it was contended upon the opposite side, that although the Bishop of Worcester could not have investigated this charge, yet the Court, which has jurisdiction over the whole of the province, might, and therefore the article was admissible. Upon such facts and arguments Sir Herbert Jenner Fust observed, "This is a criminal proceeding under an act of parliament, intitled 'An Act for better enforcing church discipline,' the 23d section of which enacts 'that no criminal suit or proceeding against a clerk in holy orders of the united Church of England and Ireland for any offence against the laws ecclesiastical, shall be instituted in any Ecclesiastical Court otherwise than is hereinbefore enacted or provided.' It is, therefore, quite clear, that these proceedings must be strictly according to the statute. [The learned judge read the different sections of the statute, and continued.] The 6th of these articles contains a charge of adultery against this clergyman, and this act of adultery is alleged to have been committed in the city of Lichfield. The diocese of Lichfield, I must presume, extends over the city of Lichfield. The party proceeded against holds preferment in the diocese of Worcester, and the commission was issued by the Bishop of Worcester. It is very certain that he, the Bishop of Worcester, could not take any notice under the statute of this offence, which was committed beyond his jurisdiction. But it is said, that, although the bishop could not, yet that this Court, as possessing jurisdiction throughout the whole province of Canterbury, might receive the charge. Now, the case is sent here by letters of request, which letters embody the proceedings before the commissioners, and those proceedings are the very foundation of the case before this Court. I am of opinion that the commissioners can proceed only within

THE CHURCH
DISCIPLINE
ACT.

Stat. 3 & 4
Vict. c. 86.
s. 13.

The commis-
sioners bound
to confine th
inquiry with
the diocese o
the bishop wh
issues the co
mission.

Judgment of
Sir Herbert
Jenner Fust
Homer v. Jones

(1) 9 Jurist, 167.

THE CHURCH
DISCIPLINE
ACT.

Mode of sign-
ing letters of
request under
stat. 6 & 7
Vict. c. 62.

the diocese of the bishop who issues the commission; and I must presume that they have bounded their inquiries, as they ought to have done, within that limit; and I therefore reject this article."

In *Brookes v. Cresswell* (1), which was a proceeding against the Rev. Henry Cresswell, vicar of the vicarage and parish church of Creech St. Michael, in the county of Somerset, and diocese of Bath and Wells, brought before the Arches Court by letters of request from the bishop of the diocese acting (in consequence of infirmity) by the Bishop of Salisbury, who had been appointed by the Queen under stat. 6 & 7 Vict. c. 62. (2)

The citation called upon the party (who was instituted to the vicarage in 1813) to answer to certain articles, charging him with quarrelling and fighting — habitually swearing — frequenting public-houses — and habitually drinking to excess.

It was contended that the whole proceedings had been coram non judice, and consequently null. That there was no proof that the Bishop of Salisbury had been empowered to act for the Bishop of Bath and Wells. But that if there had been a commission issued, and a report made, and that the bishop was not a member of the commission issued, the letters of request were not signed, as they ought to be, by the Bishop of Salisbury acting for the Bishop of Bath and Wells, but were signed, "George Henry Bath and Wells, by me, E. Sarum." And that the Bishop of Salisbury was to act as the attorney of the Bishop of Bath and Wells, and ought to have signed the letters of request in his own name.

It was urged in reply, that it was alleged in the letters of request that the Bishop of Salisbury was appointed by virtue of stat. 6 & 7 Vict. c. 62., and by letters patent, and that the Court, having accepted the letters of request, and consented to act according to their tenor, would assume omnia ritè acta fuisse, unless the contrary were shown. That with respect to the objection, that the Bishop of Salisbury should have signed the letters as acting for the Bishop of Bath and Wells, as in the case of parties who were minors, the principle did not apply, because the cause was carried on by the minor acting by his guardian, not the guardian acting for the minor.

Judgment of
Sir Herbert
Jenner Fust in
Brookes v.
Cresswell.

To these arguments, Sir Herbert Jenner Fust observed, "The statute directs that the acts shall be done 'in the name of the bishop or archbishop so found to be incompetent.' Is not the act in this case done in the name of the Bishop of Bath and Wells? I cannot doubt for one moment that the recitals in the letters of request are sufficient to give the Court jurisdiction to pronounce a sentence, and that the letters of request are in the proper form, in the name of the bishop of the diocese; they purport to be signed by the Bishop of Bath and Wells, by the hand of the Bishop of Salisbury, and every thing is to be done 'in the name' of the bishop found to be incompetent. With regard to the necessity of proving all the facts alleged in the letters of request to found the jurisdiction of this Court, I am of opinion that it is sufficient to allege them, and the other party might appear under protest, if any objection lay."

And upon a subsequent day the learned judge said, "It was contended, in the first place, that it was not necessary that there should

(1) 4 Notes of Cases Ecclesiastical, 429. (2) Stephens' Ecclesiastical Statutes, 2213.

have been any proceeding in this Court; or, at all events, that there should have been a previous inquiry by a commission; that if such previous inquiry was necessary in any case, it was in a peculiar case of this description; and if that had been done, upon the report of the commissioners, the bishop might have admonished the party without any further proceedings. This Court, however, has no power to control the exercise of the discretion of the bishop, with whom it rested to determine for himself which of the two modes provided by the act of parliament he should adopt; and the Court is bound to presume that the bishop made his election after a due consideration of all the circumstances reported to him. But the Bishop of Salisbury stood in a peculiar relation to this case; he was acting for the Bishop of Bath and Wells, and that circumstance may have led him, not unnaturally, to send the case to this Court in the first instance, as he was acting, not in his own right, but for the bishop of another diocese, with which he had but little acquaintance. I am bound to assume that the Bishop of Salisbury was satisfied that the case called for interference and investigation; and that the mode he adopted, of sending it by letters of request to this Court, in the first instance, was the preferable mode, and the Court had no option; it could not refuse the letters of request, and must proceed according to the usual form, and to the tenor of the letters."

THE CHURCH
DISCIPLINE
ACT.

Stat. 3 & 4 Vict. c. 86. s. 14. enacts "that in every case in which, from the nature of the offence charged, it shall appear to any bishop within whose diocese the party accused may hold any preferment, that great scandal is likely to arise from the party accused continuing to perform the services of the church while such charge is under investigation, or that his ministration will be useless while such charge is pending, it shall be lawful for the bishop to cause a notice to be served on such party at the same time with the service of a copy of the articles aforesaid, or at any time pending any proceedings before the bishop, or in any ecclesiastical court, inhibiting the said party from performing any services of the church within such diocese from and after the expiration of fourteen days from the service of such notice, and until sentence shall have been given in the said cause: provided that it shall be lawful for such party, being the incumbent of a benefice, within fourteen days after the service of the said notice, to nominate to the bishop any fit person or persons to perform all such services of the church during the period in which such party shall be so inhibited as aforesaid; and if the bishop shall deem the person or persons so nominated fit for the performance of such services, he shall grant his licence to him or them accordingly; or in case a fit person shall not be nominated, the bishop shall make such provision for the service of the church as to him shall seem necessary; and in all such cases it shall be lawful for the bishop to assign such stipend, not exceeding the stipend required by law for the curacy of the church belonging to the said party, nor exceeding a moiety of the net annual income of the benefice, as the said bishop may think fit, and to provide for the payment of such stipend, if necessary, by sequestration of the living: provided also, that it shall be lawful for the said bishop at any time to revoke such inhibition and licence respectively."

Stat. 3 & 4
Vict. c. 86.
s. 14.
Bishop em-
powered to
inhibit party
accused from
performing
services of the
church, &c.

Stat. 3 & 4 Vict. c. 86. s. 15. enacts "that it shall be lawful for any party who shall think himself aggrieved by the judgment pronounced in the first instance by the bishop, or in the Court of Appeal of the province, to appeal

Stat. 3 & 4
Vict. c. 86.
s. 15.
Court of
appeal.

THE CHURCH
DISCIPLINE
ACT.

Stat. 3 & 4
Vict. c. 86.
s. 16.
Archbishops
and bishops,
members of
the Privy
Council, to be
members of
the judicial
committee on
all appeals
under the act.

Stat. 3 & 4
Vict. c. 86.
s. 17.
Attendance of
witnesses, and
production of
papers, &c.
may be com-
pelled, by
the same pow-
ers . . . as
now belong to
the Consistorial
Court and to
the Court of
Arches respec-
tively.

The judge may
require the
production of
such deeds,
evidences, or
writings, as
may be neces-
sary.

from such judgment; and such appeal shall be to the archbishop, and shall be heard before the judge of the Court of Appeal of the province, when the cause shall have been heard and determined in the first instance by the bishop, and shall be proceeded in in the said Court of Appeal in the same manner, and subject only to the same appeal as in this act is provided with respect to cases sent by letters of request to the said court; and the appeal shall be to the Queen in council, and shall be heard before the Judicial Committee of the Privy Council, when the cause shall have been heard and determined in the first instance in the court of the archbishop."

Stat. 3 & 4 Vict. c. 86. s. 16. enacts "that every archbishop and bishop of the united Church of England and Ireland, who now is, or at any time hereafter shall be, sworn of her majesty's most honourable Privy Council, shall be a member of the Judicial Committee of the Privy Council for the purposes of every such appeal as aforesaid; and that no such appeal shall be heard before the Judicial Committee of the Privy Council, unless at least one of such archbishops or bishops shall be present at the hearing thereof: provided always that the archbishop or bishop who shall have issued the commission hereinbefore mentioned in any such case, or who shall have heard any such case, or who shall have sent any such case by letters of request to the Court of Appeal of the province, shall not sit as a member of the judicial committee on an appeal in that case."

Stat. 3 & 4 Vict. c. 86. s. 17. enacts "that it shall be lawful in any such inquiry for any three or more of the commissioners, or in any such proceeding for the bishop, or for any assessor of the bishop, or for the judge of the Court of Appeal of the province, to require the attendance of such witnesses, and the production of such deeds, evidences, or writings as may be necessary; and such bishop, judge, assessor, and commissioners respectively shall have the same power for these purposes as now belong to the Consistorial Court and to the Court of Arches respectively."

The jurisdiction of the Ecclesiastical Court in matters ecclesiastical does not depend on any particular canon or statute, but on the general ecclesiastical law, and on the universal consent by which some matters are exclusively of ecclesiastical, and not of temporal, cognisance.

And it appears that unless it be the intention to proceed solely under a particular statute, for a particular penalty pointed out by that statute, it is competent to plead the general ecclesiastical law as contained in the canons or constitutions.

In *Farnall v. Craig* (1), which was a proceeding, under the Church Discipline Act, against a clerk in holy orders for immoralities (2), the articles had been admitted, as well as a defensive plea, alleging that the charges were utterly without foundation, and had been concocted, from malignant motives, by the promoter. Witnesses had been examined on both pleas, and publication had passed in the cause, which now stood on admission of both proctors' asserted exceptive allegations. The defensive allegation had pleaded that, some time prior to the 17th January, 1845, the promoter addressed to the bishop of the diocese a letter, now remaining in the registry

(1) 5 Notes of Cases Ecclesiastical, 116.

(2) The respondent was ultimately suspended ab officio et à beneficio for two years, (but not then to be restored with-

out a certificate of good behaviour.) and condemned in 250*l.* nomine expensarum. (Arches. Nov. 11. 1847.)

of the vicar-general of the Archbishop of Canterbury, to whom it was officially transmitted, but of which a copy or inspection had been denied to the party proponent, wherein the promoter preferred certain charges against the party, which (as would appear from the result of the proceedings in this cause) he had not even a pretence for making, and for the support of which, he could not rely upon the testimony of any one witness produced in support of the articles which had been exhibited in his behalf. This part of the allegation was rejected by the Court as not relating to the cause. A motion was then made, on behalf of the party proceeded against, for this letter, and all papers in any manner whatever relating to the cause in the hands of the vicar-general.

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ACT.

Upon such facts Sir Herbert Jenner Fust observed, "This is a motion of a very unusual nature, and I was somewhat surprised at it, having some recollection of what passed on another occasion, and that recollection is confirmed by what was mentioned by Dr. Haggard, as to the article in the allegation in which the letter was directly referred to. That passed in the usual proceedings in the court. The letter was pleaded and referred to as in the registry of the vicar-general, and the Court was asked to admit the allegation, and the Court rejected that article of the allegation. This being so, I must say that the application at the present moment comes before the Court very unfavourably, for it is after publication in the cause, when all the evidence has been seen, and the proctor for the party accused has asserted an exceptive allegation. In this stage the Court is asked to direct an application to be made to the vicar-general (over whom it has no control) for documents alleged to be in his possession, and said to refer to the proceedings in the cause. I am told that the letter may have some reference to this cause, or it may be required for ulterior proceedings, and have no reference whatever to the charge now under investigation, but to other charges which the promoter may have made to the bishop, on which proceedings have not been taken; and now an application is made, after publication in the cause, for these documents, to assist in the defence of the party against charges concocted by the promoter. To what charges this refers, I know not; I presume to charges not under investigation. What has this Court to do with that letter? It has nothing to do with this proceeding, except that it may benefit the party in an ulterior proceeding, when possibly he may have power to procure the letter from the vicar-general by the process of a court of criminal jurisdiction. But this Court has no jurisdiction over the vicar-general. This motion is not according to the old practice in commissions of scrutiny, but it is a mere application to induce the Court to apply to the vicar-general to suffer the party to have reference to the paper. Dr. Jenner has referred to the statute, and the statute has a material bearing on the question. It directs the mode in which the party accused shall be furnished with the means of defence, and provides that he may have copies of the depositions of the witnesses and of the report of the commissioners of inquiry. This being so, the party is entitled to be furnished with every thing which passed on that commission; but there is not a syllable said in the statute as to his being furnished with the original information given to the bishop. The archbishop's registry is not to furnish any documents unless they formed part of the proceedings before the commissioners. What is this Court to do? It is to investigate

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Sir Herbert
Jenner Fust
in *Farnall v.*
Craig.

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Cruig.*

a particular charge; and the defence to that charge is, that it has been trumped up and concocted by the promoter; and to prove that fact, they say that there were other charges made against the party which were not proceeded on. Suppose an application were made to the archbishop, and refused, are there to be any further proceedings? Is there to be a monition, and is the archbishop to be pronounced in contempt, and his contempt signified? It is quite out of the course of our proceedings. This Court has nothing to do with the primary proceedings before the commission. Why was not the letter applied for before publication? Indirectly it was, and the application was rejected, and after publication the Court is asked to do what it refused in the proper stage. I am clearly of opinion that the Court has no power to comply with this application. Perhaps the document may be of importance in another charge: if so, there may be means of obtaining it by the process of the Court which entertains the criminal suit.

"In Oughton, under the title, 'De Instrumentis Exhibendis,' there is this note (1): 'Ista tamen, ante conclusionem in causâ, allegari et peti debent.' But I put my decision upon these two grounds: first, that the letter was pleaded, and rejected by the Court, as not having any reference to the present proceeding; second, that the application is made after publication in the cause to procure evidence in support of an article of the defensive allegation which the Court rejected; and why the Court is to do after publication what it refused to do before, I cannot see. I am of opinion, that there is no sufficient reason for the Court to depart from its practice, and comply with an application so unusual. I therefore reject the motion, and the cause must proceed in the usual course. If it had been alleged, that the letter had formed part of the proceedings before the commissioners, the Court might have endeavoured to assist the party; but even then I do not know that this Court could have entertained the application, for the act does not give power to enforce the furnishing of information."

Stat. 3 & 4
Vict. c. 86.
s. 18.

Witnesses to
be examined
on oath, and
to be liable to
punishment for
perjury.

Stat. 3 & 4 Vict. c. 86. s. 18. enacts "that every witness who shall be examined in pursuance of this act shall give his or her evidence upon oath, or upon solemn affirmation in cases in which an affirmation is allowed by law instead of an oath, which oath or affirmation respectively shall be administered by the judge of the court or his surrogate, or by the assessor of the bishop, or by a commissioner; and that every such witness who shall wilfully swear or affirm falsely shall be deemed guilty of perjury."

Stat. 3 & 4
Vict. c. 86.
s. 19.

Provisions of
act not to
interfere with
persons insti-
tuting suits to
establish a civil
right.

Stat. 3 & 4 Vict. c. 86. s. 19. enacts "that nothing hereinbefore contained shall prevent any person from instituting as voluntary promoter, or from prosecuting in such form and manner and in such court as he might have done before the passing of this act, any suit which, though in form criminal, shall have the effect of asserting, ascertaining, or establishing any civil right, nor to prevent the archbishop of the province from citing any such clerk before him in cases and under circumstances in and under which such archbishop might, before the passing of this act, cite such clerk under and in pursuance of a statute passed in the twenty-third year of the reign of King Henry the Eighth, intituled 'An act that no person shall be cited out of the diocese where he or she dwelleth, except in certain cases.'"

Stat. 23 Hen. 8.
c. 9.

(1) Tit. 107. note (a).

Stat. 3 & 4 Vict. c. 86. s. 20. enacts "that every suit or proceeding against any such clerk in holy orders for any offence against the laws ecclesiastical shall be commenced within two years after the commission of the offence in respect of which the suit or proceeding shall be instituted, and not afterwards: provided always, that whenever any such suit or proceeding shall be brought in respect of an offence for which a conviction shall have been obtained in any court of common law, such suit or proceeding may be brought against the person convicted at any time within six calendar months after such conviction, although more than two years shall have elapsed since the commission of the offence in respect of which such suit or proceeding shall be so brought."

THE CHURCH
DISCIPLINE
ACT

Stat. 3 & 4
Vict. c. 86.
s. 20.

Suits to be
commenced
within two
years after
the commission
of the offence.

In the office of the judge promoted by *Titchmarsh v. Chapman* (1) it appeared, that on May 20. 1843, a decree, founded on letters of request from the Bishop of Ely, issued from the Court of Arches, citing the Rev. William Herbert Chapman, for refusing a second time, on May 26. 1841, being within two years from the date of the citation, to bury the corpse or body of Jane Rumbold, spinster (an infant), a parishioner of the parish of Bassingbourne, after convenient notice or warning given on both occasions.

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Sir Herbert
Jenner Fust
in *Titchmarsh
v. Chapman.*

The party cited appeared under protest, by reason, "that the 20th section of stat. 3 & 4 Vict. c. 86. provides, that every suit or proceeding against any clerk in holy orders, for any offence against the laws ecclesiastical, shall be commenced within two years after the commission of the offence in respect of which the suit or proceeding shall be instituted, and not afterwards." That by the first refusal, in February, 1840, the offence, if any, was complete, and that the time limited by the act for proceeding in such case expired before the service of the citation.

Upon these facts Sir Herbert Jenner Fust delivered judgment in the following language:—"I have, since the last court day, looked into all the cases and authorities, and have considered the arguments, addressed to the court, upon the principles and decisions of those cases; the result I have arrived at is this, that in the present stage of the cause there is not sufficient to stop the proceedings *in limine*. I am, therefore, prepared to overrule the protest; but I do not think it advisable to enter into a discussion of the principles of the several cases, because, under the peculiar circumstances of this case, I may possibly be forestalling the arguments at the hearing, either for the prosecution, or for the defence. I will, therefore, merely state the grounds on which I think I ought to require an absolute appearance by the party cited.

"This is a proceeding against the Rev. W. H. Chapman, clerk in holy orders of the united Church of England and Ireland, rector of the rectory of a parish church of Bassingbourne in the county of Cambridge, diocese of Ely, and province of Canterbury; and the charge is, for having offended against the ecclesiastical laws, by refusing a second time, to wit, on the 26th of May, 1841, to bury the corpse or body of Jane Rumbold, spinster, a parishioner of the parish of Bassingbourne aforesaid, when duly applied to on that behalf, after convenient notice or warning given on both occasions, the first whereof occurred on or about the 17th of February, 1840, and without any just or sufficient cause on either occasion. This is the tenor of the offence which the citation sets forth as the charge against this gentleman.

(1) 3 Curt 703.

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“The question comes before the court by letters of request, which were presented to and accepted by the Court, from the Bishop of Ely; and a decree, founded on them, issued, which was returned on the 11th of May in the present year. The second application for the burial of the child was on the 26th of May; the citation, founded on the letters of request, called on Mr. Chapman to answer for having offended against the laws ecclesiastical. (The Court read the citation.) Therefore, the citation recites, that two applications have been made to this gentleman to bury the corpse of a child of one of the parishioners of the parish of which he is rector, and it states his refusal to do so on both occasions, alleging both refusals to be without just or sufficient cause.

“An appearance was given to this citation, under protest; the grounds of the protest being, that according to the true intent and construction of the act of parliament, stat. 3 & 4 Vict. c.86. s.20., the offence was committed and depending on the refusal to the first application, namely, on the 17th of February, 1840; the words of protest are, ‘That it appears on the very face of the citation that the actual offence, if any, was committed without the period prescribed by the limitations of the statute, namely, on the 17th of February, 1840, on which day the wrongful act, if any, must be holden to have been done, according to the true intent and legal interpretation of the statute aforesaid. This is the statute limiting proceedings for offences of an ecclesiastical nature: it is known as the act, ‘For better enforcing Church Discipline.’ By it, all proceedings of this nature must be commenced within two years after the commission of the offence; therefore, the ground of protest is, that the offence was committed in February, 1840, and the citation was not served until May, 1843. If the construction contended for at the bar be the true construction and interpretation of the statute, this Court has no jurisdiction to inquire into the offence; but the question for the Court to decide is, whether a fresh offence was not committed by this gentleman on the 26th of May, 1841, consequently, within the period limited by the act for proceeding against clergymen, for offences against the ecclesiastical laws, in ecclesiastical courts. There is some degree of difficulty on the first appearance of this citation; it recites the application made on the 17th of February, 1840; and it recites that such application was not attended to, namely, that the rector refused to bury the corpse on that day, without reasonable cause. On the first blush of the case, it might appear that it was intended to proceed against this gentleman for an offence committed in February, 1840, as well as for the offence in May, 1841. This was the doubt and difficulty I felt in this case, not whether an offence was committed in 1841, but whether in truth and fact it was not to be inferred, that it was intended to proceed for both offences. On consideration, however, of the language of the citation, I think that such is not the true construction; for, by the citation itself, the offence is ‘for having refused a second time, to wit, &c., being within two years.’ I take this to be the true interpretation of the charge contained in the citation.

“Then is this an offence which is capable of being repeated? In that lies the whole strength of the argument in support of the protest. My attention was called, and properly called, by Dr. Phillimore, to the language of the citation, as being deficient in clearness; and authorities were stated, and instances adduced from the Digest and other civil law authorities, to

show that a citation must be clear and specific. No doubt it must; and I think, on a due consideration of this whole instrument, that the charge is sufficiently clear; and that the party is only called on to answer for the offence of having, in 1841, refused to bury this child; which is an offence within the time limited by the statute. The question really is, Was this an offence on the 26th of May, 1841? The whole strength of Dr. Harding's argument turns on this: I am clearly of opinion, as at present advised, to hold that it is so. It would be, in my opinion, wrong, certainly contrary to anything I have heard, to stop these proceedings *in limine*, at least without having first heard the circumstances under which the application to bury this child was made a second time. Dr. Harding's argument was founded on cases at common law, actions of trover, trespass, and on the case. I have looked into all the cases cited, and there seems to me to be this distinction: in all these instances the actions arising out of them were limited by act of parliament; and the question turned on this, from what time the particular limitation by statute began to run. There is no necessity to go into the cases; on principle, when once the cause of suit arises, when that is complete, the statute runs from that time; the only question has been, whether the cause of action was complete at an early period, or at a subsequent time. (1) . . .

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"In all these cases, in trover, trespass, and action on the case, it must be recollected that the question respects a claim to property between two individuals; that when once the property has been converted, the wrongful act is complete; and that the statute runs from the period when the offence is complete. These suits regard private rights between two individuals; here the offence is a public offence, a public scandal. It must be borne in mind, that the Court knows nothing of the ground for the refusal to bury this corpse; for all the Court can know, the child may have been baptized by a clergyman of the Church of England — by the rector of this very parish himself: the refusal is not for the reason that the child was unbaptized, but is a general refusal, as to the cause of which the Court can at present know nothing. . . .

"It seems to me, at present, to be too much to say, that a clergyman may refuse to bury the corpse of a parishioner, and that, because proceedings are not instituted within a certain time, he is to be at liberty to persist in such refusal. The 68th canon imposes the same punishment for refusing to christen a child, as for refusing to bury a corpse. . . . But can it be said, that if a child be brought to be baptized, and the minister refuses on one Sunday, and it is brought a second time, that a second refusal would not be an offence; I see, at present, no distinction between the two cases; but, as before said, I will not forestall any arguments which may hereafter be offered. What is the difference between the two cases? Here is a child, for anything that appears, properly baptized, over whose body the clergyman of the parish is bound to read the church burial service; and that child, so far as appears on the citation, is unburied. This is a public scandal; and the wrong-doer, as appears on the citation, is the minister of the parish, whose duty it is to bury the child, and, until that is done, as it appears to me, the offence continues. Something was said as to the length of time between the first and second application; that may be matter proper to be

(1) *Saunders v. Saunders*, 2 East, 255. *Godin v. Ferris*, 2 Hen. Black. 14. *Wordsworth (Clerk) v. Harley*, 1 B. & Ad. 391.

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hereafter considered; but I do not think, because the corpse was not brought within a definite or specific time, that, therefore, the minister may refuse to bury it: I do not know that there is any specific time, within which a body is to be brought for interment. I well remember a case (1), where the dispute was as to the fees payable for the interment of a corpse in an iron coffin; the party died on the 2d of March, 1819; proceedings in this court were not taken until July, 1820; and the sentence of the judge was not given until May, 1821. Lord Stowell recommended that the body, which had, to use his own expression, 'remained so long unhonoured,' should be buried without prejudice to the right of the parish as to the fees to be paid. Therefore, I see no reason in this respect why the rites and services of the church should not have been performed at the period of the second application.

"Under these circumstances, as at present advised, on this citation and letters of request, the charge against this gentleman being for having refused to bury this child in 1841, therefore, within the period of two years limited by the act of parliament, although there is a recital that the party had in the first instance, when applied to to bury the corpse, refused, I cannot in this stage of the proceedings hold that this is an offence which cannot be committed a second time. The party has apparently not performed a duty incumbent on him. I think the offences may be separated from each other, and that the second refusal may be an offence for which he may be proceeded against, although the first offence may have been committed in February, 1840.

"I overrule the protest, assign the party to appear absolutely, and reserve the costs until the final hearing, or other disposal, of the cause."

When refusals constitute distinct offences and a breach of the canon law, and not simply a misconstruction of stat. 3 & 4 Vict. c. 86.

The defendant in the foregoing case, as previously stated, was cited in the Court of Arches, for refusing a second time, on the 26th of May, A.D. 1841, to bury a corpse, the first refusal appearing on the face of the citation to have been made on the 17th of February, 1840:—an application was made (2) for a prohibition, but it was held, that the decision of the Court of Arches, that these refusals constituted distinct offences, was upon a question involving the construction of the 68th canon, and, therefore, the ground of an appeal; and not simply a misconstruction of stat. 3 & 4 Vict. c. 86. s. 20., Mr. Justice Wightman observing, "It appears to me that the Ecclesiastical Court has proceeded on the ground, either that this was a continuing offence, or that the second refusal was a distinct offence in itself against the 68th canon. If so, that is a question of ecclesiastical cognisance, and the proper remedy is by appeal, if they have proceeded wrongly. The defendant, therefore, seeks to bring before this Court, not the construction to be put upon the act of parliament, but that to be put upon the 68th canon; and were I to consider this as a fit case for a prohibition to issue, I can scarcely conceive any case in which a similar application might not be made."

The commencement of the proceedings is to be dated not from the time the citation was

The commencement of the proceedings is to be dated, not from the time the citation was extracted, but from the time of its service upon the party: thus in *Brookes v. Cressicell* (3) Sir Herbert Jenner Fust said, "It has been also objected that a specific charge laid in the third article, relating to an

(1) *Gilbert v. Buzzard*, 2 Consist. 353.

(2) 1 Notes of Cases Ecclesiastical, 429.

(3) *Titchmarsh v. Chapman* (Clerk), 1 D. & L. 712.

occurrence in October, 1842, is out of time, being beyond the limit of two years prescribed by the Church Discipline Act, as the citation was not returned till the 7th November, 1844; whereas it was contended on the other side, that the commencement of the proceedings was the taking out and service of the citation, which was served in August, 1844, and consequently within two years of the offence. This point might have been raised in the case of *Lincoln (Bishop of) v. Day* (1); but in that case it was not necessary for the Court to determine the point, as it held the offence charged not to have been established.

“The Court, however, was then inclined to hold that the commencement of the proceeding, dates from the return of the citation; and upon further consideration the Court is now prepared to hold, that the commencement of the proceedings is to be dated, not from the time the citation was extracted, but from the time of its service upon the party. The case of *Sherwood v. Ray* (2) furnishes a principle upon which the Court may safely proceed. In the present case the letters of request were accepted on the 8th July, 1844, and the decree was extracted on the 10th July, but it was not served till the 27th August, and was not returned till the 7th November. No explanation has been offered to the Court to account for the delay between the extracting and the service of the decree. Why, allowing all due time for deliberation, the case might not have been brought on earlier, I am at a loss to conjecture. However, no explanation is given to account for the delay between the taking out of the citation and its service and return. The articles, however, were admitted, and an issue given; and the next question is, whether the charges against this gentleman are sufficiently proved, or to what extent.”

Sandys' case (3) will tend to illustrate the law of evidence in proving the degradation of a clergyman. It was a prosecution upon stat. 12 Geo. 1. c. 3. s. 1. (Ir.), against a degraded clergyman for marrying two Protestants.

The indictment, inter alia, stated that Richard Sandys, being a degraded clergyman of the united Church of England and Ireland, celebrated a marriage between two Protestants, viz. John Lalor and Sarah Howard.

The prisoner was indicted under stat. 12 Geo. 1. c. 3. (Ir.), entitled “An Act to prevent marriages by degraded clergymen and Popish priests, and for preventing marriages consummated from being avoided by pre-contracts, and for the more effectual punishing of bigamy.” The first section, after reciting that “clandestine marriages are for the most part celebrated by Popish priests and degraded clergymen, to the manifest ruin of several families within this kingdom,” for remedy thereof enacts, “that if any Popish priest, or reputed Popish priest, or person pretending to be a Popish priest, or any degraded clergyman, or any layman pretending to be a clergyman of the Church of Ireland as by law established, shall, after the 25th of April, 1726, celebrate, or take upon him to celebrate, any marriage between two Protestants or reputed Protestants, or between a Protestant or reputed Protestant and a Papist, such Popish priest, or reputed Popish priest, and such degraded clergyman, and layman pretending to be a clergyman, shall be, and is hereby declared to be, guilty of

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extracted, but
from the time
of its service
upon the party.

Sandys' case.

The entry of
the sentence
of degradation
in the book of
acts of the
Consistorial
Court is suf-
ficient proof of
the fact of the
degradation of
a clergyman.

Stat. 12 Geo. 1.
c. 3. (Ir.)

(1) 4 Notes of Cases Ecclesiastical, 368.

(3) 1 Irish Circ. Rep. 10.

(2) 1 Moore, P. C. Ca. 98.

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Stat. 3 & 4 Gul.
4. c. 102. ss. 1.
& 3.

felony, and shall suffer death as a felon, without benefit of the clergy, or of the statute."

Stat. 3 & 4 Gul. 4. c. 102. s. 1. repeals so much of the foregoing enactment "as declares or enacts that any Roman Catholic clergyman who shall celebrate any marriage between two Protestants or reputed Protestants, or between a Protestant or reputed Protestant and a Roman Catholic, shall be guilty of felony, and suffer death as a felon, without benefit of clergy or of the statute." But the 2d section enacts, that nothing in the act shall extend, or be construed to extend, "to the repeal of any enactments now in force for preventing the performance of the marriage ceremony by degraded clergymen."

The fact of the defendant having, about twenty years ago, frequently officiated at divine service in the parish church of Maryborough, of which he was curate, and of his name being in the registry-book, certifying births and marriages, was proved. The Rev. T. Harper, incumbent of Maryborough, proved that he was in Carlow, and took a part in the proceedings when sentence of degradation was pronounced upon the defendant by the Bishop of Leighlin and Ferns.

The clerk of the registrar of the diocese of Leighlin produced the book of acts (the book was entitled thus, in the first page, "Acts had and done in the Consistorial Court of the Diocese of Leighlin, before the Rev. S. T. Roberts, Surrogate of the Worshipful Alexander Hamilton, Esq. LL.D., Vicar-General") of that diocese from the registrar's office in Carlow, which contained the following entry, after a recital of certain prior proceedings. "On reading over the foregoing answers, his lordship the Lord Bishop of Leighlin and Ferns did pronounce sentence of degradation against the said Richard Sandys; as a priest and deacon of the Established Church.

" P. PRESTON.

" Registrar of the Consistorial Court of
Leighlin, and Notary Public."

The witness proved the signature to be that of Mr. Preston, the registrar; and being cross-examined stated, that he was clerk to the registrar since 1833; did not know of any sentence being pronounced within his time; did not know whether sentences were or not usually made up in any form, and knew of no other sentence in this case.

The celebration of the marriage was then proved by the parties married, viz. John Lalor and Sarah Lalor, otherwise Howard, who both stated they were Protestants.

The defendant, who had no counsel, then produced letters of the orders of a priest, granted on parchment, under seal, by the Bishop of Killala, and submitted that no valid sentence of degradation had been passed upon him, as he had not been duly cited to appear before the Consistorial Court of Leighlin; and that even if such sentence had been passed, it had not been sufficiently proved by a mere minute in a book, without the production of any document under seal.

Chief Justice Doherty stated, "as to the first objection, it is quite untenable; for where a judgment of a court is given in evidence, it must be taken to have been given after proceedings duly had." As to the second some difficulties do seem to exist."

An amicus curiæ suggested that, according to the ordinary practice of Ecclesiastical Courts, the sentence is and should be made out in form, and certified under seal, and that a mere entry by the registrar, in a book, of the pronouncing such sentence, was not admissible in evidence for the purpose of proving such sentence, any more than an entry in the book of the clerk of the crown is evidence of a judgment at the assizes, which must be proved by a record regularly made up.

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Counsel for the prosecution contended, that the proof given was sufficient, and mentioned that the defendant had been already twice tried and convicted of similar offences; once before Baron Smith, and once before Chief Baron Joy, on both of which occasions the degradation was proved in the manner now resorted to, and had been each time held sufficient; whereupon Chief Justice Doherty ruled the evidence to be sufficient, and left the case to the jury, who found the defendant guilty, and sentence of death was recorded. (1)

It seems, however, that if a sentence of a Spiritual Court be put in as evidence, the proceedings on which the sentence is founded ought also to be produced.

In the *Duchess of Kingston's case* (2), a sentence in a cause of jactitation of marriage was proposed to be read in evidence on behalf of the defendant, when the attorney-general, for the prosecution, insisted that the libel, allegations, answers, &c., on which the sentence was founded, should also be read, and objected to the reading of the sentence abstractedly from the allegations and other matters upon which that sentence proceeded. Whereupon Lord Camden asked the counsel for the prisoner, whether they meant to object to the whole proceedings in the jactitation cause being read. To which Mr. Wallace said: "I have not, upon the part of the noble prisoner, the least objection that all the proceedings should be brought before your lordships. I conceive that what the officer has now brought before the Court, was what is usually given in evidence in such case. I do not recollect any other in any case I have found, being produced, but the sentence, which states in short the proceedings had in that court; but I understand the proceedings are here, and on the part of the noble prisoner, there is not the least objection to the whole being laid before the Court." The proceedings were then put in. (3) The objection that the proceedings in the cause upon which was founded the sentence of degradation were not given in evidence, was not made at the trial. If it had been, it would probably have been found difficult to sustain, as a general proposition, that the sentence of a spiritual court is admissible in evidence, without reading the proceedings upon which it is founded. In the particular instance of a sentence of degradation, the reason of requiring the anterior proceedings to be read may not be very obvious, or may not apply; but the rules of evidence depend upon general principles not to be forsaken in

If a sentence
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(1) It would seem to be the practice of the Ecclesiastical Courts in general, to have sentences made up in regular form, and such a form of sentence in a cause of degradation may be seen in Cunningham. P. 338. In such a case the sentence, if made out, would probably be in the hands of the proctor of office who conducted the proceedings against the defendant in the Consistorial Court of

Leighlin. No search for the sentence was proved, nor was any evidence given to lay a foundation for the reception of the entry in the book of acts, as secondary evidence; it must, therefore, be considered to have been admitted as primary evidence of the defendant's degradation.

(2) 20 How. St. Tr. 355.

(3) Ibid. 377.

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**Stat. 3 & 4 Vict.
c. 86. s. 21.
27 Geo. 3. c. 44.
not to apply to
suits against
spiritual per-
sons for certain
offences.**

**Stat. 3 & 4 Vict.
c. 86. s. 22.
Power of arch-
bishops and
bishops as to
exempt or
peculiar places
or preferments.**

**Stat. 3 & 4 Vict.
c. 86. s. 23.
No suit to be
instituted
except as here-
in provided.**

particular cases. The judgment of a court of law is proved by the record, which contains in full the allegations of the parties, showing clearly what is in issue between them. Decrees of courts of equity, as at present framed, and sentences in spiritual courts are drawn in a short form, not reciting the proceedings in a way to show the questions at issue between the parties, and in most cases it will, perhaps, be found, that a decree or sentence when sought to be given in evidence will require, to make it intelligible, that the bill and answer, or libel and answer, be read likewise. (1)

Stat. 3 & 4 Vict. c. 86. s. 21. declares and enacts "that the act passed in the twenty-seventh year of the reign of his late majesty King George III., intituled 'An Act to prevent frivolous and vexatious suits in the Ecclesiastical Courts,' does not and shall not extend to the time of the commencement of suits or proceedings against spiritual persons for any of the offences in the said act named."

Stat. 3 & 4 Vict. c. 86. s. 22. enacts "that every archbishop and bishop, within the limit of whose province or diocese respectively any place, district, or preferment, exempt or peculiar, shall be locally situate, shall, except as herein otherwise provided, have, use, and exercise all the powers and authorities necessary for the due execution by them respectively of the provisions and purposes of this act, and for enforcing the same with regard thereto respectively, as such archbishop and bishop respectively would have used and exercised if the same were not exempt or peculiar, but were subject in all respects to the jurisdiction of such archbishop or bishop; and where any place, district, or preferment, exempt or peculiar, shall be locally situate within the limits of more than one province or diocese, or where the same, or any of them, shall be locally situate between the limits of the two provinces, or between the limits of any two or more dioceses, the archbishop or bishop of the cathedral church to whose province or diocese the cathedral, collegiate, or other church or chapel of the place, district, or preferment respectively shall be nearest in local situation shall have, use, and exercise all the powers and authorities which are necessary for the due execution of the provisions of this act, and enforcing the same [with regard thereto respectively, as such archbishop or bishop could have used if the same were not exempt or peculiar, but were subject in all respects of the jurisdiction of such archbishop or bishop respectively; and the same, for all the purposes of this act, shall be deemed and taken to be within the limits of the province or diocese of such archbishop or bishop; provided that the peculiars belonging to any archbishopric or bishopric, though locally situate in another diocese, shall continue subject to the archbishop or bishop to whom they belong, as well for the purposes of this act as for all other purposes of ecclesiastical jurisdiction."

Stat. 3 & 4 Vict. c. 86. s. 23. enacts "that no criminal suit or proceeding against a clerk in holy orders of the united Church of England and Ireland for any offence against the laws ecclesiastical, shall be instituted in any ecclesiastical court, otherwise than is hereinbefore enacted or provided."

All offences against the laws ecclesiastical, by a clerk in holy orders, are henceforth to be proceeded against according to the regulations prescribed by stat. 3 & 4 Vict. c. 86., and in no other way whatsoever. The mode of

(1) 1 Irish Circ. Rep. 13, 14. *in not.*

procedure before the passing of this statute was by articles in the diocesan or peculiar court, or by letters of request to the court of the metropolitan. Any person may prosecute a clergyman for a neglect of his clerical duty; and the Marriage Acts have not deprived the ordinary of the power of correcting any of his clergy who may offend against the order of the church in publishing banns, or solemnising matrimony, in any other manner than that prescribed by law; and also, as it would seem, for refusing to solemnise a marriage after the preliminary conditions required by the law have been satisfied. (1)

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In the matter of *York (Dean of)* (2) it appeared that the Archbishop of York, after the passing of stat. 3 & 4 Vict. c. 86., cited the Dean and Chapter of York (enjoining them to cite the canons, registrar, and officers whose presence might be required) to appear at a visitation of the dean and chapter, canonically to receive and submit to the archbishop's intended "metropolitan visitation, examinations, due corrections," &c., to exhibit their statutes, &c. if required, pay the due procurations, and further to do and receive what the business and nature of such a visitation require. He also appointed a commissary for holding the visitation in his absence, for correcting and punishing by ecclesiastical censures whoever should be contumacious, for administering articles in writing to the dean and chapter, and receiving their presentments and answers, and for adjourning and proroguing such visitation from time to time and place, and completing and dissolving the same, and for doing every thing else appertaining to the nature and quality of the said visitation. The visitation was holden, and articles of inquiry delivered to the dean and chapter, touching the administration of their funds, performance of divine service, &c. A canon, in reply to an article as to the repair of chancels, sent in a statement imputing simony to the dean, which was afterwards communicated to the dean by a private letter from the commissary. At an adjourned meeting, of which the dean had notice, but which he (unavoidably, as he said) did not attend, the canon delivered a fuller statement of the charge from a paper, which was afterwards deposited with the actuary. The commissary appointed a day for hearing evidence; and the dean was requested, by letter, written at the archbishop's desire by his secretary, to attend and meet the accusation. No formal articles or libel were ever exhibited, nor was the dean ever cited to answer any charge. On the appointed day the dean attended, but disclaimed the jurisdiction, obstructed the proceedings, was pronounced in contempt, withdrew contumaciously, and did not appear again. The commissary decreed to proceed in pœnam in his absence, and heard counsel and evidence on the charge, but refused to hear counsel for the dean till he should purge his contempt, which was not done, and the commissary gave judgment, declaring the charge proved, and that sentence of deprivation must be passed. The archbishop then passed sentence, by which he recited the above proceedings, and adjudged that the dean had committed and was convicted of simony, and was in contempt; deprived him of the dignity and place of dean, &c., and monished him not in future to use the

*In re York
(Dean of).*

Where a criminal proceeding cannot be otherwise instituted than as directed by stat. 3 & 4 Vict. c. 86.

(1) 3 Burn's E. L. by Phillimore, 364. 365. *Vide Argar v. Holdsworth*, 2 Lee (Sir G.), 516. *Wynn v. Davies*, 1 Curt. 69.

Davis v. Black (Clerk), 1 Q. B. 900. Stephens' Ecclesiastical Statutes, 1226. *in not.*

(2) 2 Q. B. 2.

dress or ensigns of a dean, on pain of the greater excommunication. The visitation was then adjourned.

On motion for a prohibition to the archbishop and commissary against proceeding further in the matter of the said charge of simony, or executing or giving effect to the sentence, it was held—1. That the inquiry before the commissary was not a mere incident to the visitation, but became a distinct criminal proceeding when the commissary entered upon the examination of proofs, as above stated, with a view to punishment.

2. That such inquiry was a “criminal proceeding” within stat. 3 & 4 Vict. c. 86. s. 23., those words not being restrained by the recital of sect. 1., which mentions only “proceedings in causes for the correction of clerks.”

3. That an archbishop or bishop, exercising his general authority as visitor of an ecclesiastical body (and not visiting under the statutes of a particular foundation), acts not personally, but as judge in a court, and must follow established forms of process and inquiry; at least in hearing accusations with a view to punishment. And, therefore,

4. That the proceeding in question was not within the reservation in stat. 3 & 4 Vict. c. 86. s. 25. of any authority which the archbishops or bishops may exercise personally, and without process in court. Consequently,

5. That the proceeding could not legally be instituted otherwise than as stat. 3 & 4 Vict. c. 86. directs.

6. That a prohibition could not have been properly moved for before the visitor proceeded to sentence; but that it might well be applied for afterwards, as the sentence had a continuing operation; and as the Court did not appear to have been dissolved at the time of the motion.

Upon such facts a prohibition was granted, without calling upon the applicant to appear; Lord Denman, after stating the facts, delivering the judgment of the Court as follows:—

“Prohibition is claimed on various grounds, and that which requires to be first considered is the late act of parliament, 3 & 4 Vict. c. 86. for better enforcing Church Discipline,’ which recites ‘that the manner of proceeding in causes for the correction of clerks requires amendment,’ repeals the act 1 Hen. 7. c. 4., prescribes the course of proceeding which shall hereafter be observed ‘in every case of any clerk in holy orders,’ ‘who may be charged with any offence against the laws ecclesiastical,’ and finally enacts ‘that no criminal suit or proceeding against a clerk in holy orders’ ‘for any offence against the laws ecclesiastical, shall be instituted in any ecclesiastical court otherwise than’ according to the provisions of that act. These enactments are, however, qualified by a proviso, ‘That nothing in this act contained shall be construed to effect any authority over the clergy of their respective provinces or dioceses, which are archbishops or bishops of England and Wales, may now according to law exercise personally and without process in court.’

“The twenty-third section, enacting that no criminal suit or proceeding shall be instituted in any other manner than this act requires, was relied on as a decisive bar against the trial that has taken place. The counsel for the dean argued, that he, being a clerk in holy orders, was prosecuted in a criminal proceeding for the offence of simony, a known offence against the laws ecclesiastical, and that the authority which assumes to deprive him is an ecclesiastical court, the court of the ordinary holding his visitation. Two

answers to this argument are offered. 1. That what has been done is not a criminal proceeding within the meaning of the act. 2. That the proceedings were in virtue of authority exercised by the archbishop, according to the law as it then stood, over a clerk of his province, personally, without process in court.

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“The learned counsel against the prohibition observed, in the first place, that the statute applied to causes, a word said to be well understood, and to import suits regularly promoted in the Spiritual Courts. But the employment of that word in the short preamble affords a most inadequate reason for an arbitrary restriction of the whole act to that form of proceeding which in the ecclesiastical law may be with technical propriety described as a cause. I might as well be restricted to causes promoted for incontinency, the only class punishable under stat. 1 Hen. 7. of which the repeal is the only object of the same section, after a recital that the manner of proceeding for correction of clerks ought to be amended. But although the first section is thus limited, the general enactments are extended to all offences; and in like manner, though causes are the only proceedings mentioned in the preamble, the twenty-third section clearly provides that the course enjoined by the statutes shall be pursued in every criminal suit or proceeding against a clerk in holy orders in the courts ecclesiastical.

“But is this a criminal proceeding, or is it merely an incident at fact arising out of the visitation, in the course of which it is brought to the ordinary’s knowledge, and, properly, in the discharge of that duty, inquired into by him, but not instituted as a criminal proceeding? The answer appears to be that, as soon as the visitor proceeds to examine the proofs of an ecclesiastical offence committed by a clerk for the purpose of punishment by deprivation, more especially, as in this case, at the instance of an accuser who avails himself of the aid of a professional advocate, a criminal proceeding is undoubtedly instituted and in full progress.

If a visitor examine the proofs of an ecclesiastical offence committed by a clerk for the purpose of punishment, criminal proceeding is instituted.

“There is yet another term in the description of suits or proceedings given by the twenty-third section. They must be in some ‘ecclesiastical court.’ The ordinary’s visitation is said not to be an ecclesiastical court, but to range within the proviso (1), which prevents the statute from applying to authority personally exercised by the bishop without process in court.

“This brings us directly to the question, whether the bishop, as visitor of a dean and chapter, is legally invested with power to deprive the dean of his office for an ecclesiastical offence without process in court? If he has the power, he must derive it from the general words above cited; but they can scarcely be expected to receive this construction without proof that they have habitually, and in former times, when church discipline was much more active than of late, been so construed, or at least that the learned writers on ecclesiastical law have put that meaning upon them.

“Now in the first place, there is no example of such a power being exercised by the bishops over their clergy, even in their regular and solemn visitations. They are, indeed, exempted from the forms required by the common law, and are to proceed in the language found in many books and

(1) Sect. 25.

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The courts have
no right to
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ports of com-
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the direct pur-
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struing the
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themselves.

copied in Com. Dig. *Visitor* (C): ‘Summariè, simpliciter, et de plano sine strepitu aut figurâ judicii;’ that is (adds Comyns), according to mere law and right. But some forms, as involving the opportunity of knowing and answering the charges, are absolutely necessary for securing this object. The report of the Ecclesiastical Commissioners was appealed to on both sides; on the one, for proof that the late statute was not meant to apply to the visitatorial power, because no recommendation to that effect is given. We have frequently had occasion to observe, that the courts have no right to look at similar reports for the direct purpose of construing the statutes founded upon them, which must speak for themselves. On the other hand, the report was referred to as a depository of the former law, which is not, however, there said to have trusted the visitor with the power now claimed. It states that the ordinary was to proceed in the correction of clerks in a kind of forum domesticum. However these words are to be understood, it was still a forum. Spiritual persons who offended were presented by the churchwardens, on whom this duty was cast; if they neglected it, others might present; or, even if common fame were the only accuser, the ordinary might make his inquiries. Different modes of dealing with the charges are enumerated; inquisitio, accusatio, denunciatio articles were exhibited; and the party had time and place given to answer them. Sentence was at length passed by the ordinary, personally, perhaps, but (according to all our experience) in his court, and, in no usual sense of the words, without process. And, on this head of argument, the question was asked, and not satisfactorily answered, why, if the ordinary possessed this power personally and without process, such great difficulties had been encountered, and such enormous expenses incurred in bringing notorious spiritual delinquents to justice by deprivation. It is well known that the assumed want of the power now claimed formed one strong motive for introducing the new law.

“The saving clause may not improperly have been intended to apply to some other powers of regulation and control, vested by law in the archbishops and bishops; but, if none such could be surmised, still the effect of no such saving clause can be greater than the protection of something that is shown to have existed: it cannot create authority in any one to act personally and without process in a particular case, by merely saying that the act does not deprive him of such authority in general terms. The precaution secures what the law recognised before; but the question remains — what did the law recognise?”

Philips v. Bury.

“We are aware that the jurisdiction of visitors has been described in most comprehensive terms by common lawyers of high authority. Lord Holt himself is cited as allowing them an arbitrary power, in his often reported judgment in the case of *Philips v. Bury*. (1) That copy of it taken from his own manuscript, and now printed in 2 T. R. (2) agrees almost word for word with that which is recorded by Skinner. (3) Scarcely any other remark upon it requires to be made, than that the case arose out of the visitation of a charitable foundation. Holt’s strong language is all applied to that case. The founder might do as he would with his own: the parties deriving benefit from his endowment must abide by the conditions which he

(1) 1 Ld. Raym. 5.

(2) P. 346.

(3) P. 475.

has annexed. *Cujus est dare ejus est disponere.* *St. David's (Bishop of) v. Lucy* (1), where the Archbishop of Canterbury gave sentence of deprivation against one of his suffragan bishops for simony and other ecclesiastical offences, was supposed to show that power to reside in the breast of the archbishop, without any rules or forms. Prohibition was claimed, on the ground that the citation was to appear at Lambeth, not in the usual place of holding the metropolitan court, and it was answered here by Lord Holt and his brethren, that the archbishop 'may hold his court where he pleases;' that 'the Spiritual Court might proceed to punish him for any offence done against the duty of his office as bishop;' adding, 'as the clergy are under different rules and duties, it is but reasonable that, if an ecclesiastical person offend in his ecclesiastical duty, he should be punishable for it in the Ecclesiastical Court.' These expressions all occur in Salkeld's Report. (2) The bishop was called by citation to answer for his delinquency. The form and mode of proceeding were objected to in no other particular than the place of sitting. We scarcely need say that this case supplies no evidence of the right to proceed personally without process in court.

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St. David's
(Bishop of)
v. Lucy.

"Another case was cited for the same purpose: *Kildare (Bishop of) v. Dublin (Archbishop of)* (3), brought by writ of error to the House of Lords in 1724. The bishop, as dean of the church of the Holy Trinity, complained that the archbishop proceeded against him in the court christian for a contempt committed during the visitation. The principal question intended to be raised was, whether the king or the archbishop was the visitor of the dean and chapter of that cathedral; and this being decided in favour of the archbishop, all others respecting the mode of proceeding were comparatively unimportant; nor indeed does the case furnish us with a very full detail of what took place. Enough, however, appears, to show that the offence was contumacy, committed by shutting the doors of the cathedral against the archbishop, and not appearing in his visitation; and that the archbishop 'impleaded' the plaintiff as dean 'in the court christian, in causâ visitationis ordinarii ipsius archiepiscopi,' 'under pretence of a contempt.' The House of Lords held that the right of the archbishop to visit the dean and chapter was established, and that the manner of his doing so was not at all material, because any error or defect in the manner might be remedied by appeal, and was no foundation for a prohibition: and this is the marginal note appended to the report, the general point being perfectly clear, that, when there is jurisdiction, the manner of exercising it affords no ground for prohibition. But the declaration, instead of alleging that the visitor proceeded to sentence (whatever that sentence might be, for it is not set forth), personally and without process, leads to the contrary inference. The words above extracted from it are rather descriptive of a suit afterwards commenced by the archbishop in his court as ordinary; and this even where the offence was a direct contempt of his person and authority. But it is enough to say, and indisputably true, that this case does not establish the proposition, for which alone it was wanted, that the visitor has lawful power to deprive personally, and without process in court.

Kildare (Bishop of) v. Dublin (Archbishop of)

(1) 1 Ld. Raym. 447. 539. 1 Salk. 134.
3 Ibid. 90. 12 Mod. 237.; *et vide* 14 How.
St. Tr. 447. 1 Burn's E. L. 232, *et seq.* tit.
Bishops, vii. 4.

(2) 1 Salk. 134.
(3) 2 Bro. P. C. 179. 2d ed.

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Bishop of
Exeter's case.

" So in the *Bishop of Exeter's case* (1), the acts of the bishop, having been performed within his jurisdiction as visitor of Exeter College by appointment of the founder, were held to be uncontrollable by it. Such decisions can have no bearing on the present case, unless it were shown that all the powers which any founder has conferred on his visitor grow out of the relation of an ordinary to his clergy on his holding a visitation of them. It is highly probable that the use of the same word on two such different occasions has led to the belief that such was the law. The opinion is thus accounted for ; but the law can only be established by practice and precedent. Both are wanting here.

" Some of the books speak of a court of visitation ; and the phrase is not incorrect. It is an authority acting with certain forms of procedure and inquiry, suspending its proceedings from time to time by adjournment, making certain orders and decrees. Whether or not these acts are of necessity judicial, those done in the course of establishing a charge against a party accused bear that undoubted character.

" The authority now challenged declared the party in contempt for withdrawing himself after citation, and required him to purge his contempt before he could be heard in his defence against charges preferred. It proceeded with the examination of witnesses in support of those charges, and finally adjudged him guilty, and awarded sentence of deprivation. All these are assuredly the acts of a court. It is admitted that they may be appealed against ; and we are at a loss to conceive an appeal against any proceedings, but those of a court. The Court, however, the late statute has divested of all such jurisdiction. It is not within the saving clause, which leaves untouched the ordinary's power over his clergy, as it might then be exercised by law without process in court, because this power does not appear to have been ever exercised by law. We are constrained to conclude that the most reverend prelate, in so far as he proceeded at his visitation to deprive the dean, has acted without jurisdiction.

" Finding that this preliminary obstacle is not to be surmounted, we decline to enter upon the consideration of the numerous points raised in certain portions of the proceedings, by the learned commissary. But there is one not unfit to be disposed of. The sentence being final, and executed, it was argued that nothing now remained which this Court could prohibit from being done, and not even a continuing court to which our writ could be addressed. These arguments, for obvious reasons, require to be narrowly watched, for they would give effect to unlawful proceedings, merely because they were brought to a conclusion. But to the present case they are inapplicable. For, on looking at the sentence, we find that it admonishes the dean not to exercise the functions of dean on pain of the greater excommunication, and that the Court was adjourned only when this motion was made. The infliction of that pain would be the mode of enforcing that sentence ; and this we may prohibit, and we find in some of the entries that this Court has enjoined revocation of the sentence. The dean could not apply before sentence, for the sentence of deprivation is the only thing done which is beyond the jurisdiction of the archbishop. Up to that point he had unquestionable power ; for it was his duty to inquire with a view to

(1) *Philips v. Bury*, 1 *Ld. Raym.* 5. *Skin* 447. 2 *T. R.* 346.

ulterior proceedings; and it seems that the lord chancellor discharged an application for prohibition which had been made to him before sentence, on that very ground.

"Our clear conviction is not embarrassed by an opposite judgment formed by the learned commissary; for he does not appear to have adverted to the statute during the whole proceedings. We cannot but believe that it escaped his attention, occupied as it was with a vast variety of unusual circumstances, and not assisted (as indeed it could not be according to the view which he took of the duties of his office) by advocates on both sides.

"If we felt any doubt, we should be bound to invite further discussions by calling upon the Dean of York to declare in prohibition: but, after the full and deliberate, long prepared, and maturely digested arguments which we have had enforced with consummate ability, by counsel of the greatest learning, and of the highest reputation, no additional light can be expected. We owe it to all the parties, to save them the inconvenience and anxiety of fruitless delay; we owe it to the public, and in a peculiar manner to the church, to encourage no doubt, when we feel none, on subjects of such immense importance, and so deeply affecting its interests, its rights, and its duties."

In *Bluck (Clerk) v. Rackham* (1) it was held that stat. 3 & 4 Vict. c. 86. did not repeal or restrict the provisions of stat. 1 & 2 Vict. c. 106. s. 32., as to the enforcement of the penalties for non-residence under that statute.

Stat. 3 & 4 Vict. c. 86. s. 24. enacts "that when any act, save sending a case by letters of request to the court of appeal of the province, is to be done, or any authority is to be exercised, by a bishop under this act, such act shall be done, or authority exercised, by the archbishop of the province, in all cases where the bishop who would otherwise do the act or exercise the authority is the patron of any preferment held by the party accused."

Stat. 3 & 4 Vict. c. 86. s. 25. enacts "that nothing in that act contained shall be construed to affect any authority over the clergy of their respective provinces or dioceses which the archbishops or bishops of England and Wales may now, according to law, exercise personally and without process in court; and that nothing herein contained shall extend to Ireland."

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Stat. 3 & 4
Vict. c. 86. did
not restrict
stat. 1 & 2
Vict. c. 106.
s. 32.

Stat. 3 & 4 Vict.
c. 86. s. 24.

If a bishop is
patron of the
preferment
held by accused
party, arch-
bishop to act
in his stead.

Stat. 3 & 4 Vict.
c. 86. s. 25.

Saving of arch-
bishop's and
bishop's
powers.

8. TEMPORAL PROCEEDINGS FOR A NEGLECT OF CLERICAL DUTIES.

A clergyman can be prosecuted for a neglect of his clerical duties, and an action for the recovery of damages can in some cases be maintained against a clergyman for the non-performance of his duties. (2)

Argar v. Holdsworth (3) seems to support the proposition, that an action

TEMPORAL
PROCEEDINGS
FOR A NEGLECT
OF CLERICAL
DUTIES.

A clergyman

(1) 4 Notes of Cases Ecclesiastical, 534.
Vide tit. RESIDENCE.

(2) *Vide tit. BAPTISM — BURIAL — MAN-
DAMUS — MARRIAGE — PROHIBITION.*

(3) 2 Lee (Sir G.), 515. *Vide Wynn v.
Davies*, 1 Curt. 69. *Davis v. Black (Clerk)*,
1 Q. B. 900. Stephens' Ecclesiastical Sta-
tutes, 1226. *in not.*

TEMPORAL
PROCEEDINGS
FOR A NEGLECT
OF CLERICAL
DUTIES.

may be prose-
cuted by any
person for neg-
lecting his
clerical duties.

for damages may be sustained against a clergyman for a neglect of his duties, but clearly lays down, that a clergyman may be prosecuted by any one for a neglect of his clerical duty.

It appeared that William Argar promoted articles in the court of the Archdeacon of Totness, against Henry Holdsworth, vicar of St. Saviour's in Dartmouth, for neglecting or refusing to solemnise marriage between him and Jane How, both of the parish of St. Saviour's, and having a licence to be married from the Chancellor of Exeter. On 18th September, 1756, the articles were admitted at Totness, pleading, 1st, "that Holdsworth is a clerk and vicar of St. Saviour's in Dartmouth; 2d, that by canons, &c., every minister is to obey his ordinary's licence, &c.; 3d, that every minister is obliged by law to marry such of his parishioners as have resided a month in his parish; that the parties named in the licence are his parishioners, and have resided a month, and have obtained a licence to be married together; 4th, that Argar had a proper licence to marry How, and acquainted Holdsworth therewith, and desired him to marry them, but he refused; 5th, that he had thereby incurred ecclesiastical censures; 6th, that he is subject to the jurisdiction of the court at Totness; 7th, pray he may be censured, &c." From admitting these articles, Holdsworth appealed to the Chancellor of Exeter." On 4th March, 1757, the chancellor pronounced the 3d and 4th articles as not concludent, &c. and rejected them, but admitted the rest, and retained the cause, with costs. Argar appealed to the Arches from rejecting the 3d and 4th articles, and retaining the cause, and condemning him in costs, and Holdsworth did not adhere to the appeal.

It was contended for Holdsworth, that Argar should have brought a suit at law for damages, or if any suit lay in the Spiritual Court, it should have been brought before the Chancellor of Exeter, who granted the licence; that the licence was not exhibited, without which the articles were not concludent; that a minister is not obliged by law to marry by licence, but is only permitted so to do, and if he have reason to think it was fraudulently obtained, he ought to refuse to marry in consequence of it, which was the case with Holdsworth; and, therefore, the judge ought to have rejected all the articles.

But Sir George Lee pronounced for the appeal, and made the following note of his judgment: "I said that possibly Argar might have an action for damages, but, nevertheless, the clergyman might be prosecuted by any one for neglect of his clerical duty; that the suit for such neglect might be brought in order to his being admonished or suspended in the archdeacon's court, notwithstanding the licence was granted by the chancellor; that the licence might be exhibited at any time before conclusion of the cause; that I was of opinion a licence was a legal authority for marriage, and that a minister was guilty of a breach of his duty, who should refuse to marry pursuant to a proper licence from his ordinary. If Holdsworth had reason to believe the licence was obtained fraudulently, and only delayed to gain time for inquiry, that would be proper matter for his defence; but surely the chancellor had acted strangely in rejecting the articles which alone pleaded the facts relative to this cause, and admitting these articles which pleaded only the general law. I, therefore, pronounced for the

appeal, and remitted the cause to the archdeacon's court at Totness, and condemned Holdsworth in 25*l.* costs."

To constitute a criminal neglect of clerical duty requiring censure and correction, there must be neglect without just cause: but unless such cause be shown, the law will infer its absence. (1)

In a criminal suit, the Court is strictly confined to the offences charged in the articles. (2)

In a criminal suit against a clergyman of unimpeached moral character, remote charges of omission or irregularity in performing divine service, being shown generally not to be "without 'just cause,'" more recent charges being completely rebutted; no neglect of duty being imputed for the two years next before the institution of the suit; the clergyman, as to one charge of misconduct, having erred from mistake; and as to two of the remaining charges (one of which totally misrepresented the fact), having acted properly: the Court pronounced the articles not proved; and, as no fair ground for a suit existed at the time of its institution, dismissed the defendant with his costs. (3)

If, in a criminal suit, the charges are clearly proved, unaccompanied by circumstances of reasonable excuse or explanation; the Court, presuming the promoter acts from a sense of duty, will not inquire into his motives; aliter, if the misconduct be not proved, or even if proved, be sufficiently accounted for. (4)

The præsertim of articles is always construed as setting forth the nature of the principal charges; the general words as only including subordinate charges ejusdem generis. (5)

Length of time, though it may not amount to a bar to a criminal suit, will induce the Court to admit general explanation, instead of requiring a direct contradiction or explanation of each specific fact. (6)

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PROCEEDINGS
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DUTIES.

To constitute criminal neglect, there must be neglect without just cause.

Court strictly confined to the charges in the articles.

Remote charges of omission or irregularity.

When the Court will presume the promoter acts from a sense of duty.

The præsertim of articles construed as setting forth the nature of the principal charges.

Effect of a length of time in a criminal suit.

9. PERFORMANCE OF ECCLESIASTICAL DUTIES IN AN UNCONSECRATED CHAPEL OR BUILDING WITHOUT EPISCOPAL LICENCE OR AUTHORITY.

Barnes v. Shore (7) will illustrate, that a clerk cannot divest himself from obedience to his bishop and perform ecclesiastical duties in an unconsecrated chapel or building without episcopal licence or authority; and in which case Lord Denman delivered the judgment of the Court in the following language:—

"This was a rule for a writ of prohibition to the Arches Court of Canterbury from proceeding in a suit instituted by Ralph Barnes, gentleman, against the Rev. James Shore, in the court of the Bishop of Exeter, and removed by letters of request into the Arches Court, for officiating in an unconsecrated chapel at Bridge Town in the diocese of Exeter, without the licence

PERFORMANCE
OF ECCLESIAS-
TICAL DUTIES
IN AN UNCON-
SECRATED
CHAPEL OR
BUILDING,
WITHOUT EPIS-
COPAL LICENCE
OR AUTHORITY.

A clerk cannot divest himself from obedience to his bishop, and perform ecclesiastical duties in an un-

(1) *Bennett v. Bonaker*, 3 Hagg. 25.

(2) *Ibid.*

(3) *Ibid.* 19.

(4) *Ibid.* 28.

(5) *Ibid.* 25.

(6) *Ibid.* 26.

(7) Q. B. May 4. 1846. The author is indebted to Mr. J. L. Adolphus for a copy of the judgment delivered by the Court in this case.

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chapel or building,
without
episcopal
licence or authority.

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Shore* (Clerk).

and against the monition of the bishop of that diocese. Mr. Shore had been admitted to priest's orders some years ago by a former bishop of Exeter, and had officiated in the chapel in question with the licence of the present bishop for some years; but that licence had been withdrawn, and the chapel had been registered in due form under stat. 52 Geo. 3. c. 155. as a dissenting chapel, and Mr. Shore officiated in it, professing to officiate as a dissenting minister. Mr. Shore being a priest in holy orders, the general jurisdiction of the bishop of the diocese in which he does any act relating to religious worship is undoubted. The cases of *Trebec v. Keith* (1) and *Carr v. Marsh* (2) are abundantly sufficient to establish this position without minute examination of the canons on the subject, and in the last edition of Burn's E.L. (3), a case is stated from MSS. of *Keate v. London* (Bishop of), in which this Court discharged a rule for a prohibition where Mr. Keate was sued in the Ecclesiastical Court for officiating without the bishop's licence; and the question whether the charge brought against Mr. Shore can or cannot be substantiated; and if substantiated, what penalty he may have incurred, are not to be inquired into in this Court. The only question for us is, whether, by any act of parliament, Mr. Shore is, under the circumstances, exempted from the jurisdiction of the bishop. It appears that he put in a defensive allegation stating the facts, and claiming exemption as a dissenter, which allegation the learned judge of the Court of Arches refused to receive, and such refusal raises the question for our consideration. The statute mainly relied on is 52 Geo. 3. c. 155. That statute provides for the certifying and registering places of religious worship, and then provides by sect. 4. that every person who shall teach or preach at, or officiate in, or resort to, 'such place' shall be exempt from all such pains and penalties under any act or acts of parliament relating to religious worship as any person who shall have taken the oaths and made the declaration prescribed by, and mentioned in, an act made in the first year of the reign of King William and Queen Mary, intituled 'An Act for exempting their Majesty's Protestant subjects dissenting from the Church of England from the penalties of certain laws, or any act amending the said act is by law exempt from as fully and effectually as if all such pains and penalties, and the several acts enforcing the same, were recited in this act, and such exemptions as aforesaid were severally and separately enacted in relation thereto.'

"This clause manifestly does not touch the present case. It exempts only from penalties under certain acts of parliament. The present suit is not founded on, and has no relation to, any penalty under any act of parliament, or to any act of parliament at all, but is a suit in the Ecclesiastical Court founded on the common law of the land. There is a clause in stat. 1 Gul. & M. c. 18. s. 4. which prohibits proceedings in the Ecclesiastical Court under the circumstances there stated, but stat. 52 Geo. 3. c. 155. does not incorporate that clause nor allude to it. The 13th section of stat. 52 Geo. 3. c. 155. was referred to on the argument as saving the jurisdiction of the bishop, but it relates principally to places consecrated or licensed by the bishop, and does not bear upon the present question.

(1) 2 Atk. 498.

(2) 2 Phil. 198.

(3) Vol. 1. p. 306. (a).

“From an attentive consideration of all the clauses of this act (1), it is quite plain that it does not exempt any person from a suit in the Ecclesiastical Court to which he would otherwise be liable. That statute clearly exempts from the penalties of the acts of parliament then in force as to public worship, ‘all persons dissenting from the Church of England who shall take the oaths mentioned in the first chapter of that session (the oaths of allegiance and supremacy), and make the declaration mentioned in 30 Car. 2. st. ii. c. 1. (the declaration against transubstantiation and invocation of saints); and the 4th sect. further enacts, ‘nor shall any of the said persons be presented in any Ecclesiastical Court for or by reason of their non-conforming to the Church of England in holy orders.’ The 8th sect. also exempts persons dissenting from the Church of England, or pretended holy orders, or pretending to holy orders, and preachers and teachers of congregations of dissenting Protestants who shall take such oath and make such declaration, from the penalties of certain acts of parliament, but it is silent as to proceedings in any Ecclesiastical Court. Upon the whole, therefore, it appears that the only clause in any act of parliament which exempts any persons from proceedings in the Ecclesiastical Court is the 4th sect. of stat. 1 Gul. & M. c. 18., and that only from proceedings for or by reason of their non-conforming to the Church of England. In order to avail himself of the protection of this clause Mr. Shore must show, first, that he is a person dissenting from the Church of England who has taken the oaths of allegiance and supremacy, and made the declaration against transubstantiation. Secondly, that he is sued in the Ecclesiastical Court for or by reason of his non-conforming to the Church of England. As to the first, some question may be made whether the proper oaths have been taken, but it is hardly necessary to inquire closely into that point. No distinct rule appears to be laid down as to who may be properly said to be persons dissenting from the Church of England; but it should seem that, as dissent is matter of opinion, any one who says that he does dissent is entitled to be treated as a dissenter, and that whether he be in holy orders or a layman. Mr. Shore, therefore, may be entitled to insist upon being treated as a dissenter upon his mere assertion that he is so, without any formal act of separation being necessary either by him or against him. But he cannot so divest himself of the character of a priest in holy orders, with which he has been clothed by the authority of the Church of England when he was ordained by one of her bishops, and when he vowed and promised canonical obedience to that church. From that character and that vow and promise, he can be released only by the same authority which conferred the one and enjoined and received the other. The 76th canon provides in express terms, ‘No man being admitted a deacon or minister shall from thenceforth voluntarily relinquish the same, nor afterwards use himself in the course of his life as a layman upon pain of excommunication, and the churchwardens shall prevent him.’ Therefore, although he may, as a dissenter, be exempted by the 4th sect. of stat. 1 Gul. & M. c. 18. from being sued in the Ecclesiastical Court for mere non-conformity to the Church of England, he is not exempt by that or any other act from canonical obedience to the bishop as a

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Stat. 52 Geo. 3.
c. 155. does not
exempt any
person from a
suit in the Ec-
clesiastical
Court to which
he would other-
wise be liable.

A priest in holy
orders cannot
ex mero motu
divest himself
from canonical
obedience to
the church.

PERFORMANCE
OF ECCLESIAS-
TICAL DUTIES
IN AN UNCON-
SECRATED
CHAPEL, ETC.

Judgment of
Lord Denman
in *Barnes v.*
Shore (Clerk).

priest, in regard to any thing that he may do according to the rites and ceremonies of the Church of England. This brings the whole matter to the second and last point — whether he is sued in the present instance for nonconforming to the Church of England or for breach of discipline as a priest of that church. Now the seventh article exhibited in the Arches Court makes that matter perfectly clear, for it charges that Mr. Shore, on Sunday the 14th of April, 1814, and on Sunday the 28th of July, 1814, did take upon himself publicly to read prayers, preach, administer the holy sacrament of the Lord's Supper, and perform ecclesiastical duties and divine offices, according to the rites and ceremonies of the united Church of England and Ireland, in an unconsecrated chapel or building, in the diocese of Exeter, without any licence or authority for so doing, and contrary to and in spite of the injunction or monition of the Bishop of Exeter.

“No one can fail to see that this is not a charge for non-conforming to the Church of England. The previous articles had charged that he was a priest in holy orders ordained by a former bishop of Exeter; and the seventh article manifestly charges that, being such priest, he performed the services and duties proper to such priest according to the rites and ceremonies of the Church of England, but in a place, and under circumstances which made such performance a breach of the discipline of that church, and that he is sued for such breach of discipline. Whether facts can be proved which will establish that charge, it is not for us to inquire. Mr. Shore has denied the charge, and the Ecclesiastical Court will doubtless make the proper inquiry into the truth of it. It is sufficient for the purposes of this motion for a prohibition, that we see that the charge is one peculiarly and exclusively of ecclesiastical jurisdiction, and that no act of parliament exempts a person situated as Mr. Shore is from that jurisdiction, in respect of such charge.”

FARMING AND
TRAFFICKING.

10. FARMING AND TRAFFICKING.

The principal statutes forbidding the farming and trafficking of spiritual persons are stat. 1 & 2 Vict. c. 10., stat. 1 & 2 Vict. c. 106., stat. 4 & 5 Vict. c. 14.

Stat. 4 & 5
Vict. c. 14. s. 1.
No association
or copartner-
ship, or contract
entered into, is
to be illegal or
void by reason
only of spiri-
tual persons
being members
thereof.

Stat. 4 & 5 Vict. c. 14. s. 1., after reciting — that divers associations and copartnerships, consisting of more than six members or shareholders, had from time to time been formed for the purpose of being engaged in and carrying on the business of banking and divers other trades and dealings for gain and profit, and had accordingly for some time past been and were then engaged in carrying on the same by means of boards of directors or managers, committees or other officers, acting on behalf of all the members or shareholders of, or persons otherwise interested in such associations or copartnerships: that divers spiritual persons, having or holding dignities, prebends, canonries, benefices, stipendiary curacies, or lectureships, had been and were members or shareholders of, or otherwise interested in, divers of such associations and copartnerships: and that it was expedient to render legal and valid all contracts entered into by such associations or copartnerships, although the same may then be void by reason of such

spiritual persons being or having been such members or shareholders or otherwise interested; enacts "that no such association or copartnership already formed, or which may be hereafter formed, nor any contract either as between the members, partners, or shareholders composing such association or copartnership for the purposes thereof; or as between such association or copartnership and other persons, heretofore entered into, or which shall be entered into, by any such association or copartnership already formed or hereafter to be formed, shall be deemed or taken to be illegal or void, or to occasion any forfeiture whatsoever, by reason only of any such spiritual person as aforesaid being or having been a member, partner, or shareholder of or otherwise interested in the same, but all such associations and copartnerships shall have the same validity, and all such contracts shall and may be enforced in the same manner to all intents and purposes, as if no such spiritual person had been or was a member, partner, or shareholder of or interested in such association or copartnership: provided always, that it shall not be lawful for any spiritual person holding any cathedral preferment, benefice, curacy, or lectureship, or who shall be licensed or allowed to perform the duties of any ecclesiastical office, to act as a director or managing partner, or to carry on such trade or dealing aforesaid in person."

Stat. 4 & 5 Vict. c. 14. s. 2. enacts that, in all actions and suits brought or instituted by or on behalf of any such association or copartnership, which may have been formed since the session of 2 & 3 Vict., in case any defendant therein shall, before the 29th of March, 1838, by plea or otherwise, have insisted on the invalidity of any contract thereby sought to be enforced, by reason of any such spiritual person having been a member or shareholder in such association or copartnership, he shall be entitled to the full costs of such plea or other defence, to be paid by the plaintiff, and to be taxed as the court in which the action or suit shall be depending, or any judge thereof, shall direct; and in order fully to indemnify such defendant the court or judge can order the plaintiff to pay to him such further costs, if any, of the action or suit as the justice of the case may require. (1)

Stat. 4 & 5 Vict.
c. 14. s. 2.
In all actions
and suits the
defendant to
be entitled to
taxed costs,
and the Court
may make
order for
further costs.

By stat. 1 & 2 Vict. c. 106. s. 28. "it shall not be lawful for any spiritual person holding any cathedral preferment or benefice, or any curacy or lectureship, or who shall be licensed or otherwise allowed to perform the duties of any ecclesiastical office whatever, to take to farm for occupation by himself, by lease, grant, words, or otherwise, for term of life or of years, or at will, any lands exceeding eighty acres in the whole, for the purpose of occupying or using or cultivating the same, without the permission in writing of the bishop of the diocese specially given for that purpose under his hand; and every such permission to any spiritual person to take to farm for the purpose aforesaid any greater quantity of land than eighty acres, shall specify the number of years, not exceeding seven, for which such permission is given; and every such spiritual person who shall, without such permission, so take to farm any greater quantity of land than eighty acres, shall forfeit for every acre of land above eighty acres so taken to farm, the sum of 40s. for each year during or in which he shall so occupy, use, or cultivate such land contrary to the provision aforesaid."

Stat. 1 & 2 Vict.
c. 106. s. 28.
Spiritual per-
sons not to
take to farm
for occupation,
above eighty
acres, without
consent of the
bishop, and
then not be-
yond seven
years, under
penalty of 40s.
per acre.

(1) Stat. 4 & 5 Vict. c. 14. is essentially a re-enactment of stat. 1 & 2 Vict. c. 10., consequently the provisions of the latter statute have been omitted. *Vide* Stephens' Ecclesiastical Statutes, 1814,

**FARMING AND
TRAFFICKING.**

**Stat. 1 & 2 Vict.
c. 106. s. 29.**

No spiritual person, beneficed or performing ecclesiastical duty, shall engage in trade, or buy to sell again, for profit or gain.

**Stat. 1 & 2 Vict.
c. 106. s. 30.**

not to extend to spiritual persons engaged in keeping schools, or as tutors, &c. in respect of anything done, or any buying or selling in such employment; or to selling anything *bonâ fide* bought for the use of the family, or to being a manager, &c. in any benefit, or life, or fire assurance society; or buying and selling cattle, &c. for the use of his own lands, &c.

**Stat. 1 & 2 Vict.
c. 106. s. 31.**

Spiritual persons illegally trading may be suspended, and for the third offence deprived.

By stat. 1 & 2 Vict. c. 106. s. 29. "it shall not be lawful for any spiritual person holding any such cathedral preferment, benefice, curacy, or lectureship, or who shall be licensed or allowed to perform such duties as aforesaid, by himself or by any other for him or to his use, to engage in or carry on any trade or dealing for gain or profit, or to deal in any goods, wares, or merchandize, unless in any case in which such trading or dealing shall have been or shall be carried on by or on behalf of any number of partners exceeding the number of six, or in any case in which any trade or dealing, or any share in any trade or dealing, shall have devolved or shall devolve upon any spiritual person, or upon any other person for him or to his use, under or by virtue of any devise, bequest, inheritance, intestacy, settlement, marriage, bankruptcy, or insolvency; but in none of the foregoing excepted cases shall it be lawful for such spiritual person to act as a director or managing partner, or to carry on such trade or dealing as aforesaid, in person."

By stat. 1 & 2 Vict. c. 106. s. 30. "nothing thereinbefore contained shall subject to any penalty or forfeiture, any spiritual person for keeping a school or seminary, or acting as a schoolmaster or tutor or instructor, or being in any manner concerned or engaged in giving instruction or education for profit or reward, or for buying or selling or doing any other thing in relation to the management of any such school, seminary, or employment, or to any spiritual person whatever for the buying of any goods, wares, or merchandizes, or articles of any description, which shall without fraud be bought with intent at the buying thereof to be used by the spiritual person buying the same for his family or in his household; and after the buying of any such goods, wares or merchandizes, or articles, selling the same again or any parts thereof which such person may not want or choose to keep, although the same shall be sold at an advanced price beyond that which may have been given for the same; or for disposing of any books or other works to or by means of any bookseller or publisher; or for being a manager, director, partner, or shareholder, in any benefit society, or fire or life assurance society, by whatever name or designation such society may have been constituted; or for any buying, or selling again for gain or profit, of any cattle or corn or other articles necessary or convenient to be bought, sold, kept, or maintained by any spiritual person, or any other person for him or to his use, for the occupation, manuring, improving, pasturage, or profit of any glebe, demesne lands, or other lands or hereditaments which may be lawfully held and occupied, possessed, or enjoyed by such spiritual person, or any other for him or to his use; or for selling any minerals the produce of mines situated on his own lands; so nevertheless that no such spiritual person shall buy or sell any cattle or corn or other articles as aforesaid in person in any market, fair, or place of public sale."

By stat. 1 & 2 Vict. c. 106. s. 31. if any spiritual person trade or deal in any manner contrary to the provisions of the act, the bishop of the diocese where such person shall hold any cathedral preferment, benefice, curacy, or lectureship, or allowed to perform the duties of any ecclesiastical office, can cause such person to be cited before his chancellor or other competent judge; and, on proof of trading, such spiritual person for his first offence can be suspended for such time not exceeding one year, as to the judge shall seem fit; and for a second offence committed subsequent to such sentence or suspension, can be suspended for such time as to the judge shall seem fit, and for his third offence be deprived *ab officio et*

beneficio; and thereupon the patron of any such cathedral preferment, benefice, lectureship, or office, can make donation or present or nominate to the same as if the person so deprived were actually dead; and in all such cases of suspension, the bishop during such suspension can sequester the profits of any cathedral preferment, benefice, lectureship, or office of which such spiritual person may be in possession, and by an order under his hand direct the application of the profits, after deducting the necessary expenses of providing for the due performance of the duties of the same respectively, towards the same purposes, and in the same order, as near as the difference of circumstances will admit, as are thereafter directed with respect to the profits of a benefice sequestered in case of non-compliance after monition with an order requiring a spiritual person to proceed and reside on his benefice, but no part of such profits is to be paid to the spiritual person so suspended, nor applied in satisfaction of a sequestration at the suit of a creditor; and in case of deprivation the bishop must forthwith give notice thereof in writing under his hand to the patron of any cathedral preferment, benefice, lectureship, or office, which the spiritual person may have held in the manner thereafter required with respect to notice to the patron of a benefice continuing under sequestration for one whole year, and thereby becoming void, and any such cathedral preferment or benefice will lapse at such period after the notice, as any such last-mentioned benefice would under the provisions of the act lapse: but no contract will be deemed void, by reason only of the same having been entered into by a spiritual person trading or dealing, either solely or jointly, with any other person, contrary to the provisions of the act, and every such contract may be enforced by or against such spiritual person (1), as if no spiritual person had been party to such contract.

FARMING AND
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A partnership has been thus described by Puffendorf (2):—“*Contractus societatis est, quo duo pluresve inter se pecuniam, res, aut operas conferunt, eo fine, ut quod inæreditur lucrum inter singulos pro ratâ dividatur.*”

Partnership
defined.

Partners (3) may be classed into ostensible, nominal, dormant, and secret.

Ostensible,

An ostensible partner is he whose name appears to the world as that of a partner. A nominal partner is an ostensible partner, having no interest in the firm. A dormant partner is he whose name and transactions as a partner are professedly concealed from the world. When they are actually unknown to the world he is, more strictly speaking, a secret partner.

Nominal,
Dormant, or
secret partner

The *delectus personæ* is so essentially necessary to the constitution of a partnership, that even the executors and representatives of partners themselves do not, in their capacity of executors or representatives, succeed to the state and condition of partners.

An executor
does not
succeed to
the condition
of a partner.

To constitute a partnership between the parties themselves, there must be a communion of profit between them. A communion of profit implies a communion of loss, for “every man who has a share of the profits of a trade ought also to bear his share of the loss.” (4) But a partnership may be

There must
a communion
of profit.

(1) Spiritual persons merely licensed to perform the duties of any ecclesiastical office are amenable to the foregoing statutes; but if they possess no benefices, curacies, or lectureship, &c., the punishment appears to be suspension, and upon a third offence deprivation of office only.

(2) Lib. v. c. 8.

(3) *Vide* Stephens on Nisi Prius, tit. PARTNERS, 2375—2428.

(4) *Per* De Grey C. J. in *Grace v. Smith*, 2 Black. (Sir W.), 999. *Dry v. Boswell*, 1 Camp. 329. Collyer on Partnership, 21.

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Not requisite that shares in a partnership should be equal.

Partnership may exist in any business which is not a mere personal office.

Where subject of the contract is *malum prohibitum*, or *malum in se*.

Usurious contracts.

Non omission of the directions of an act of parliament.

without participation of profit by a party lending his name, though contracting that he shall suffer no loss. (1) In such a case he will still be a partner, enjoying, in addition to the advantages of partnership, the indemnity afforded him by his companions. (2)

Although the shares in a partnership must be joint, it is not necessary that they should be equal: and a contingent interest in the profits will make a man a partner *pro tanto*, though he may have parted with every other interest as a partner.

Generally speaking, a partnership may exist in any business or transaction which is not a mere personal office, and for the performance of which payment may be enforced. (3)

Whether the subject of a contract be *malum prohibitum*, or *malum in se*, there can be no partnership founded upon it, so as to give the contractors a remedy either against each other, or against third persons, at law or in equity. (4) A contract originally entered into for the purpose of evading the usury laws, and not *bonâ fide* with the view of partnership, cannot be supported as a legal contract of partnership. (5) But the omission of the directions of an act of parliament, where the consequence is not pernicious to the public in general, will not render the partnership illegal, so as to deprive the partners from recovering upon a legal contract. (6)

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GENERALLY — *Citation defined* — Canon 120. none to be cited into Ecclesiastical Courts by process of *quorum nomina* — *Citation of a company in their natural capacity* — *Misnomer of party* — *Misnomer of judge* — In criminal suits, permission of judge must be obtained to promote his office — *By whom service of citation to be executed according to the old law* — *In what manner to be executed* — *Distinction between a citation and a personal service* — STAT. 23 HEN. 8. c. 9., and decisions thereon — *Return of citation*.

GENERALLY.

The Ecclesiastical Courts proceed according to the course of the civil and canon laws, by citation, libel, &c. A person is not generally to be cited to appear out of the diocese or peculiar jurisdiction where he lives, unless it be by the archbishop, in default of the ordinary, or where the ordinary is party to the suit, in cases of appeal, &c.; and by law a defendant may be sued where he lives, though it be for subtracting tithes in another diocese, &c.

(1) *Ex parte Watson*, 19 Ves. 459.

(2) *Fereday v. Horder*, Jacob, 145.

(3) *Waugh v. Carter*, 2 Hen. Black. 235.; et vide *Borill v. Hammond*, 6 B. & C. 149.

(4) *Sullivan v. Greaves*, Park on Insurance, 8. *Mitchell v. Cockburne*, 2 Hen. Black. 379. *Aubert v. Maze*, 2 B. & P. 371. *Armstrong v. Lewis*, 2 C. & M. 274.

(5) *Morse v. Wilson*, 4 T. R. 353. *Jestons v. Brinke*, 2 Cowp. 793.

(6) *Brown v. Duncan*, 10 B. & C. 93.

Hudgson v. Temple, 5 Taunt. 181. *Johnson v. Hudson*, 11 East, 180.

(7) *Vide tit. APPEAL* — *ARCHES* — *BRAWLING AND SMITING* — *CAVEAT* — *CHANCELLOR*, *OFFICIAL PRINCIPAL*, *VICAR GENERAL*, *AND COMMISSARY* — *CONTUMACY* — *DEGRADATION* — *DEPRIVATION* — *EXCOMMUNICATION* — *INTERVENER* — *MANDAMUS* — *MARRIAGE* — *PRIVILEGES AND RESTRAINTS OF THE CLERGY* — *PROHIBITIONS* — *QUARE IMPEDIT* — *REQUEST (LETTERS OF)* — *SEQUESTRATION* — *SIMONY* — *VISITATION*.

A citation is a judicial act, whereby the defendant, by authority of the judge, (the plaintiff requesting it,) is commanded to appear, in order to enter into suit, at a certain day, in a place where justice is administered. (1)

The citation ought to contain: — 1. The name of the judge, and his commission, if he be delegated; if he be an ordinary judge, then the style of the court where he is judge. 2. The name of him who is to be cited. 3. An appointed day and place where he must appear; which day ought either to be expressed particularly to be such a day of the week or month, or else only the next court day (or longer) from the date of the citation; and the time of appearance ought to be more or less, according to the distance of the place where they live. 4. The cause for which the suit is to be commenced. (2) 5. The name of the party at whose instance the citation is obtained. (3) 6. And also the residence and diocese of defendant, to show that he is not cited out of his diocese. (4)

By canon 120. "no bishop, chancellor, archdeacon, official, or other ecclesiastical judge, shall suffer any general processes of quorum nomina to be sent out of his court, except the names of all such as thereby are to be cited, shall be first expressly entered by the hand of the registrar or his deputy, under the said processes, and the said processes and names be first subscribed by the judge or his deputy, and his seal thereto affixed."

It was a rule of the ancient canon law, that by the general clause quidam alii in citations, not more than three or four persons should be drawn into judgment; whose names (quorum nomina) the person who obtained the citation was particularly to express, that there might be no room for fraud, in varying the names at pleasure. (5)

A company in London (6) refusing to pay a church rate set upon their hall, the master and wardens were cited into the Ecclesiastical Court by their surnames and names of baptism, with the addition of master and wardens of the company of wax chandlers. And upon moving for a prohibition, because they were cited in their natural capacity, when it should have been in their politic capacity, the Court held the citation to be good, because the body politic could not be cited, and the writ was denied.

The citation of a party by an erroneous christian name, a simple misnomer or false addition, where there is no doubt as to the identity of the party, has been holden to be sufficient. (7) An objection of this kind, urged as a plea in abatement (8), must be taken before issue, for, by giving issue, the party allows himself to be the party designed (9); and whoever alleges a misnomer is bound to assign the true name by which he means to abide, and against which he is not at liberty to aver (10); but a new citation must be taken out. Where the general law is to be relied upon, it is not necessary that it

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Citation defined.

What the citation ought to contain.

Canon 120. None to be cited into Ecclesiastical Courts by process of quorum nomina.

Citation of a company in their natural capacity.

Misnomer of party.

(1) Conset, 26.

(2) But in a criminal suit for incest, a marriage may be annulled, although the citation contained no evidence to that effect. *Chick v. Ramsdale*, 1 Curt. 34.

(3) Conset, 26.

(4) *Vide stat.* 23 Hen. 8. c. 9.

(5) Gibson's Codex, 1009.

(6) *Thusfeld and Jones, Master and Wardens of the Company of Wax Chandlers*, Skin. 27.(7) *Powell v. Burgh*, 2 Lee (Sir G.), 517.*Barham v. Barham*, 1 Consist. 7. *Griffiths v. Reed*, 1 Hagg. 196.(8) *Vide stat.* 3 & 4 Gul. 4. c. 42. s. 11. *Stephens on Nisi Prius*, 1258. 2024.(9) *Williams v. Bott*, 1 Consist. 3. *Powell v. Burgh*, 2 Lee (Sir G.), 518. 3 Burn's E. L. by Phillimore, 246.(10) *Pritchard v. Dalby*, 1 Consist. 187.

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should be specifically stated in the citation (1); and as to variance between the articles and citation, where the charge is substantially the same, and only a part of the charge is taken away, it will not be fatal. A citation has been held sufficient, where it only called upon the party to bring in an administration, and to show cause why another should not be granted, and did not say to show cause why the original administration should not be revoked (2); but it has been holden void, where it was taken out upon false pretences, and not served on the party against whom it had been entered. (3) In a matrimonial suit it has been held, that a citation issuing as "in a suit of nullity of marriage, by reason of a former marriage," will not found a sentence of separation, "by reason of an undue publication of banns," the woman being therein described as spinster, the first husband having died subsequently to the publication of banns, but prior to the marriage. (4) A wrong description of the judge, either by his name or title, is fatal to the citation, and to all proceedings founded on it, especially in criminal suits. And an error of this kind in a copy delivered to the proctor of the defendant, has been held to entitle the latter to be dismissed from the suit. (5)

Misnomer of judge.

In criminal suits, permission of judge, must be obtained to promote his office.

By whom service of citation to be executed according to the old law.

In criminal suits, the permission of the judge must be obtained to promote his office (6), and the party promoting must give bond with sureties to the judges as a security for costs.

Respecting the service of the citation according to the old law, a constitution of Otho, after reciting that — "forasmuch as we are given to understand, that they who have obtained letters citatory do send them by three vile messengers to the place where the person to be cited is said to inhabit; which letters two of them do put up over the altar of the church of that place, or in some other place there, and the third presently take them away; from whence it cometh to pass, that two of them afterwards giving their testimony that they cited him according to the manner and custom of the country, he is excommunicated or suspended as contumacious, whereas, indeed, he was not contumacious, nor knew any thing of the citation. Therefore to take away this most abominable abuse, and other such like," ordains — "that from henceforth letters citatory in causes ecclesiastical shall not be sent by those who obtain them, nor by their messengers; but the judge shall send them by his own faithful messenger, at the moderate expense of the person suing them out; or at least the citation should be directed to the dean of the deanery, [that is, to the rural dean], where the party to be cited dwelleth, who at the judge's commandment shall faithfully execute the same by himself, or his certain and trusty messengers." (7)

"We do decree, that when the judge sendeth a citation against any person who is absent, he shall commit the execution thereof to the dean of the place, or to some person certain." (8)

A constitution of Archbishop Stratford, after reciting that "bishops and archdeacons, their officials and other ordinaries, and their commissaries, command primary citations for the correction of offenders to be executed

(1) *Hutchins v. Denzillor*, 1 Consist. 172.

(2) *Reece v. Stratford*, 1 Hagg. 347.

(3) *Murphy v. McCarthy*, 2 Lee (Sir G.), 529.

(4) *Wright v. Ellwood*, 2 Hagg. 598.

(5) *Williams v. Butt*, 1 Consist. 1. 3 Burn's E. L. by Philimore, 247.

(6) *Maidman v. Malpas*, 1 Consist. 209.

(7) Otho, Athon, 63.

(8) *Ibid.* 123.

by rectors, vicars, or parish priests; and it is frequently laid to their charge, that concerning those matters for which the citation is made, they perversely disclose the confessions of the parties cited made privately unto them, whereby they are greatly scandalised, and the parishioners for the future refuse to confess their sins unto them," ordains, "that primary citations from the said ordinaries shall not be served by the rectors or others aforesaid, but by the officials, deans, apparitors, or other ministers of the said ordinaries. And if any such primary citations shall be committed to the rectors, vicars, or priests, they shall not be bound to obey them, but the same and all subsequent censures and processes thereupon shall be utterly void and of no effect." (1)

By the constitution of Otho, the person to whom the citation was directed was diligently to seek the party to be cited. And when he had found him, he was to show to the party cited the citation under seal, and by virtue thereof cite him to appear at the time and place appointed. And it was usual also to leave a note with him, expressing the contents thereof. (2)

In what manner the citation was to be executed

If it be returned upon the citation that the defendant cannot be found then the plaintiff's proctor is to petition that the defendant may be cited personally (if he can) to appear and answer the contents of the former citation; and if not personally, then by any other ways and means, so as the party to be cited may come to the knowledge thereof; and this is called a citation viis et modis, or a public citation, because it is executed either by public edict, a copy thereof being affixed to the doors of the house where the defendant dwells, or the doors of the parish church where he inhabits, for the space of half an hour in the time of divine service; or by publication in the church in time of divine service; or, as it has been said, by the tolling of a bell, or the sounding of a trumpet, or the erecting of a banner. This being done, a certificate must be made of the premises, and the citation brought into court; and if the party cited appear not, the plaintiff's proctor accuses his contumacy, (he being first three times called by the crier of the court,) and in penalty of such his contumacy requests that he may be excommunicate. (3)

But the citation must be served at the door, or outside of a man's house; for the house cannot be entered without his consent. (4)

And by the constitution of Otho, if the person to whom the citation is committed be not able to find the party, he must cause the letters to be publicly read and expounded on the Lord's day, or other solemn day, in the church of the place where he usually dwelt, during the celebration of the mass.

Or, says, Athon (5), publicly in the street, if he be hindered from entering the church; otherwise he shall read the citation in the church, and leave a copy thereof upon the altar: and the absent person, by other ways, means, and cautions (if any occur), shall be cited, before he be proceeded against as contumacious.

In like manner, by a constitution of Archbishop Mepham, in certain cases they who cannot be personally cited, are to be cited at their houses, if

(1) Lyndwood, Prov. Const. Ang. 90.

(2) 1 Oughton, 44, 45.

(3) Conset, 34. 1 Oughton, 49.

(4) Lyndwood, Prov. Const. Ang. 87. Athon, 63.

(5) Ibid. 65.

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they have any at which they can be safely cited; if they cannot be safely cited at their house, then in the parish church where such house stands; or if they have no house, then in the cathedral church of the diocese, and also in the church of the parish where the offence was committed (if it can be safely done). And in such cases they shall be proceeded against in the same manner, as if they had been cited personally. (1)

Where the incumbent of a benefice cannot be found, service of a monition, by leaving it at the parsonage house, is sufficient, notwithstanding the incumbent does not habitually reside in it. (2)

Distinction
between a
citation and a
personal ser-
vice.

There is some difference between this service and personal service. A personal service may conclude both the party and the Court; but a service *viis et modis* is a constructive service, and concludes the party, but does not conclude the Court. The Court, on good and sufficient grounds, may open the proceedings to get at the substantial justice of the case. (3) And it is laid down in the books, says Sir William Wynne, and is not to be denied, that parties may be put in contempt by a public citation only. (4)

Stat. 23 Hen.
8. c. 9. s. 1.

Stat. 23 Hen. 8. c. 9. (5), after reciting that "great number of the king's subjects, as well men, wives, servants, as other the king's subjects, dwelling in divers dioceses (6) of this realm of England and of Wales, heretofore have been at many times called by citations, and other processes compulsory, to appear in the Arches, Audience, and other high courts of the archbishops of this realm, far from, and out of the diocese (7) where such men, wives, servants, and other the king's subjects being inhabitant and dwelling, and many times to answer to surmised and feigned causes, and suits of defamation, withholding of tithes, and such other like causes and matters, which have been sued more for malice and for vexation, than for any just cause of suit.

Sect. 2.

"And where certificate hath been made by the summoner, apparitor, or any such light literate person, that the party against whom any such citation hath been awarded, hath been cited (8) or summoned, and thereupon the

(1) Lyndwood, Prov. Const. Ang. 85.

(2) *Green v. Cobden*, 2 Bing. N. C. 627.

(3) *Herbert (Lady) v. Herbert (Lord)*, 2 Consist. 263. *Thomas Robinson (In the gowls of)*, 3 Phil. 511.

(4) *Elme v. Da Costa*, 1 ibid. 176.

(5) *Vide* stat. 3 & 4 Vict. c. 86. s. 19. Stephens' Ecclesiastical Statutes, 130—136. 2084.

(6) *In divers dioceses*: — By the ancient laws of the church, the metropolitan was forbid-den to exercise judicial authority in the diocese of a comprovincial bishop, unless in case of appeal, or vacancy: "Nullus primas, vel metropolitanus, diocesani ecclesiam, vel parochiam, aut aliquem de ejus parochia præsumat excommunicare, vel judicare, vel aliquid agere absque ejus consilio vel judicio." Caus. 9. q. 3. c. 7. And in a like case (ibid. c. 8.), it is added: "Nisi forte pro causis, quæ apud se terminare non possunt, ad te quasi ad patriarcham suum provocaverint: vel, si episcopus suus decesserit, res ecclesie sue judicio tuo dispensare voluerint." And therefore, when Archbishop Peccham (Reg. Pecch. f. 145. (a), 148. (a)), excommunicated the Bishop of

Hereford for resisting this concurrent power, and affirming against the archbishop, "*non posse in subditos suos, ipso omisso, jurisdictionem aliquam exercere, nec de causis subditorum suorum ullo modo cognoscere per querelam*:" the archbishop defended his claim, not upon the common right of a metropolitan, but upon the peculiar privilege of the church of Canterbury. — "*Cum ecclesia Cant. tali gaudeat privilegio in corpore jur' redacto, quod archiepiscopus qui pro tempore fuerit, causas subditorum suffraganeorum suorum, etiam per simplicem querelam audire possit et debeat*," — which privilege probably originated from the Archbishops of Canterbury being legati nati to the Pope. *Lynche v. Porter*, 2 Brownl. 3.

(7) *Far from, and out of, the diocese*: — *Vide Goblott's case*, Cro. Car. 339. *Ford v. Widdon*, Raym. (Sir T.), 92. *Moore v. Cockin*, 1 Keb. 651. 1 Rol. 328.

(8) *Cited*: — But if a man be cited out of his diocese, and appear, and sentence be given, or if he submit himself to the suit, he can have no benefit by this statute, nor will a prohibition be granted. *Anon. Hethl.* 19. 1 Vent. 61.

same party, so certified to be cited or summoned, hath not appeared according to the certificate, the same party therefore hath been excommunicated, or at the least suspended from all divine service; and thereupon, before that he or she could be absolved, hath been compelled, not only to pay the fees of the court whereunto he or she was so called by citation, or other process, amounting to the sum of two shillings, or twenty pence at the least; but also to pay to the summoner, apparator, or other light literate person, by whom he or she was so certified to be summoned, for every mile being distant from the place where he or she then dwelled, unto the same court, whereunto he or she was so cited or summoned to appear, twopence, to the great charge and impoverishment of the king's subjects, and to the great occasion of misbehaviour and misliving of wives, women, and servants, and to the great impairment and diminution of their good names and honesties;" enacts, "that no manner of person shall be from henceforth cited or summoned, or otherwise called to appear (1), by himself or herself, or by any procurator, before any ordinary, archdeacon, commissary, official, or any other judge spiritual, out of the diocese, or peculiar jurisdiction where the person which shall be cited, summoned, or otherwise (as is aforesaid) called, shall be inhabiting and dwelling at the time of awarding, or going forth of the same citation or summons, except that it shall be for, in, or upon any of the cases or causes hereafter written; that is to say, for any spiritual offence or cause committed or done, or omitted, forslewed, or neglected to be done, contrary to right or duty, by the bishop, archdeacon, commissary, official, or other persons having spiritual jurisdiction, or being a spiritual judge, or by any other person or persons within the diocese or other jurisdiction, whereunto he or she shall be cited, or otherwise lawfully called to appear and answer.

PROCESS.

Stat. 23 Hen. 8.
c. 9.

"And except (2) also it shall be by or upon matter or cause of appeal, or for other lawful cause, wherein any party shall find himself or herself grieved (3) or wronged by the ordinary judge or judges of the diocese or jurisdiction, or by any of his substitutes, officers, or ministers, after the matter or cause there first commenced, and begun to be showed unto the archbishop, or bishop, or any other having peculiar jurisdiction (4), within whose province the diocese or place peculiar is; or in case that the bishop, Sect. 3.

(1) *Called to appear*: — In *Vanacre v. Spies* (Carth. 33.), after sentence given in the Spiritual Court, a prohibition was moved for, upon suggestion, that the person was cited out of his proper diocese. But the prohibition was denied, because, by pleading to the libel, he had admitted the jurisdiction of the court. And the statute does not take away the jurisdiction of all matters arising out of the diocese, but only gives him who lives out of the diocese a new privilege of pleading to the jurisdiction; which benefit of pleading, if neglected, and the party suffer a sentence to be given against him there, will not serve him for a prohibition afterwards to that court whose jurisdiction he has admitted.

(2) *Except*: — "Archiepiscopus non est iudex ordinarius totius provincie: archiepiscopus enim omnium episcoporum sue

diocesis est ordinarius, sed non subditorum, nisi in casibus," &c. Extra. l. 5. t. 31. c. 8. v. *Attentare*.

(3) *Grieved*: — A citation in a cause of office, must describe sufficiently the offence charged against the party, so as to show that it is a matter of ecclesiastical cognisance; but it need not minutely specify all the particulars of the offence, which are to be charged in the articles. *Office of the Judge promoted by Steward v. Francis*, 3 Curt. 209.

(4) *Peculiar jurisdiction*: — Viz. whether they be cited out of such peculiar to the Arches, or before the ordinary, within whose diocese the peculiar is placed. *Kadwulader v. Bryan*, Cro. Car. 162. And it was said in *Moore v. Cockein* (1 Rol. 329.), that if a man be sued out of his diocese, yet if he be sued within his own proper peculiar, he is not within this statute.

PROCESS.

Stat. 23 Hen. 8.
c. 9.

or other immediate judge or ordinary dare not, nor will not (1) convent the party to be sued before him; or in case that the bishop of the diocese, or the judge of the place, within whose jurisdiction, or before whom the suit by this act should be commenced and prosecuted, be party (2), directly or indirectly, to the matter or cause of the same suit; or in case that any bishop, or any inferior judge, having under him jurisdiction in his own right and title, and by commission, make request (3), or instance to the archbishop,

(1) *Will not*: — In Parker's Register, (1 Park. 395. (b); 2 Ibid. 74. (a), 98. (b), 105. (b).) it appears, that the archbishop placed benefices in another diocese under sequestration, propter negligentiam ordinarii; but this is an act only of voluntary jurisdiction. And before the Reformation, we find the archbishop requiring bishops to proceed against particular irregular persons in their dioceses, or show cause why he himself should not proceed. Staff. 7. (b), 25. (b). Adam Wint. 38. (a, b), 43. (b).

(2) *Be party*: — In the case of the Bishop of Carlisle (cit. Gibson's Codex, 1007.), it was holden, that if a cause be commenced before the archbishop, and that the bishop or other judge die while it is depending, and so the occasion ceases upon which it was first brought before the archbishop, yet, from having been brought within his jurisdiction, it could not be removed.

(3) *Make request*: — It must appear on the face of the proceedings, that the parties are competent to sign letters of request: thus, in the case of the office of the judge promoted by *Steward v. Bateman* (3 Curt. 201.), the Dean of the Arches declined to accept letters of request presented jointly by the Archdeacon and Chancellor of Norwich, it not appearing that the Archdeacon of Norwich had an exempt jurisdiction.

Stat. 23 Hen. 8. c. 9. devolves upon the Dean of the Arches the power of accepting letters of request in matrimonial suits, without the consent of the party proceeded against. *Butler v. Dalben*, 2 Lee (Sir G.), 312.

Causes of church-rate may be removed by letters of request from the commissary of the bishop to the Court of Arches. Thus in *Hawes and Vicar v. Pellatt* (2 Curt. 473.), which was a suit for subtraction of church-rate, brought by virtue of letters of request from the commissary of the Bishop of Winchester, for the parts of Surrey within that diocese, by the churchwardens of the parish of Christchurch, Surrey, against Mr. Pellatt, a parishioner. The defendant appeared to the citation under protest, and contended that he had been wrongfully cited; that it was contrary to the statute 23 Hen. 8. c. 9. that he should be called upon to appear in this court by letters of request, and that the reason stated for granting the letters of request, namely, that he might have the benefit of employing advocates and proctors, did not apply to him, as he, being a Dissenter, did not intend to employ advocates or proctors, who, being members of the Established

Church, would, he conceived, necessarily have a bias against him, and for whose assistance, although unsuccessful, he would have to pay.

Upon such facts, Sir Herbert Jenner observed, "The question is, whether a suit for subtraction of church-rate, which is undoubtedly of ecclesiastical cognisance, may be brought here by letters of request? It is almost of daily occurrence, that questions of ecclesiastical cognisance are so brought, and the practice has been recognised by courts of common law; and I know of no principle of law which distinguishes cases of church-rate from others.

"With regard to the reason set forth for issuing the letters of request, it is usual to state, that the parties would have the benefit of the assistance of advocates and proctors, which they could not have in the court below. It may be inconvenient to the defendant to be cited out of his diocese or peculiar jurisdiction, and if unsuccessful to pay the costs of the party taking out the letters of request; but it is the plaintiff who is under the necessity of resorting to legal advice and assistance, since every act he does must be in accordance with the rules of the court; if he commit an error in drawing up the citation or libel, he may at once fail in his suit; whereas the party cited has less need of assistance, and may conduct his own defence if he chooses to do so, without professional advice.

"I am clearly of opinion that the right of the party to proceed in this court is well founded. This has been decided in the case cited by Dr. Addams (*Exp. Williams*, 4 B. & C. 315.), in which Lord Chief Justice Abbott said, 'Taking this offence to have been created by 5 & 6 Edw. 6. c. 4., I should think, that the authority thereby given to the ordinary is to be exercised in the same manner as any other authority given to that officer. Now one mode of exercising his authority is by letters of request to the archbishop, or his substitutes. But in *Winmouth v. Collins* (2 Ld. Raym. 850.) Lord Holt appears to have been of opinion, that the offence of brawling was not created by the statute which has been referred to, and I think that his opinion was correct. If that be so, all difficulty is removed, and there can be no doubt that the Court of Arches may derive jurisdiction from letters of request. It appears that in that case another objection had been taken, namely, that the letters of request ought to have been addressed to the bishop of the

bishop, or other superior ordinary or judge, to take, treat, examine, or determine the matter before him, or his substitutes, and that to be done in cases only (1) where the law civil or canon doth affirm execution of such request, or instance of jurisdiction, to be lawful or tolerable: upon pain of forfeiture to every person by any ordinary, commissary, official, or substitute, by virtue of his office, or at the suit of any person to be cited, or otherwise summoned, or called contrary to this act, of double damages and costs for the vexation in that behalf sustained, to be recovered against any such ordinary, commissary, archdeacon, official, or other judge, as shall award or make process, or otherwise attempt or procure to do any thing contrary to this act, by action of debt, or action upon the case, according to the course of the common law of this realm in any of the king's high courts, or in any other competent temporal court of record, by original writ of debt, bill, or plaint; in which action, no protection, other than such as shall be made under the king's great seal, and signed with his sign manual, shall be allowed, neither any wager of law, nor essoin shall be admitted; and upon pain of forfeiture for every person so summoned, cited, or otherwise called (as is abovesaid) to answer before any spiritual judge out of the diocese (2), or other jurisdiction where the said person so dwelleth,

PROCESS.

Stat. 23 Hen. c. 9.

The forfeit of an ordinary offending against the purport of this statute.

diocese, and not to the Court of Arches; that the appeal should have been from the commissary, first to the bishop and then to the Court of Arches; but it was held, that an appeal from the commissary to the bishop, whose judge he was, would be an appeal *ab eodem ad eundem*, and that the appeal was direct to the Court of Arches. This is a parallel case, and there can be no doubt of the jurisdiction of the Court. I, therefore, overrule the protest, and with costs."

The Arches Court has also original jurisdiction in suits for subtraction of legacy, where the will is proved in the Prerogative Court of Canterbury. *Vide Ecclesiastical Commissioners' Report*, February 27. 1832, p. 11.

The Arches Court have, however, no jurisdiction to determine the allowance to be made for the maintenance and education of minors. *Fleet v. Holmes*, 2 Lee (Sir G.), 140.

In *Dawe v. Williams* (2 Add. 130.), an objection to the jurisdiction of the Court to entertain a suit for "brawling," by letters of request, was over-ruled, Sir John Nicholl observing, "It has been suggested, upon the authority of some ancient dicta, that under the true construction of the Statute of Citations, a suit for brawling cannot be brought in the Court of Arches by letters of request; but it is not denied, that suits so brought have constantly been entertained in this Court. Besides, the defendant did not appear under protest; but after having appeared absolutely to the citation, he takes the objection to the jurisdiction at the admission of the articles. Upon the whole, the Court feels itself bound to allow the suit to proceed, unless it should be stopped by a prohibition. Should such a measure be held to lie against the jurisdiction of this Court, under the circumstances

of the present case, the Court will readily, as it will be his duty, put an end to the proceeding."

(1) *In cases only*:—It was held by the civilians in *Jones v. Jones* (Hob. 185. 2 Brownl. 27.), that it was absolutely in the power of the ordinary, to send any cause to the archbishop at his will, without assigning any special reason, for which they cited the authority of divers canonists. But Hobart, and as it seems the Court, said, "That to expound the statute thus, viz. that the ordinary may, at his will and pleasure, send the subject from one end of the kingdom to another without cause, was both against the letter of the statute, and eludes it utterly. That the purpose of the law was, to provide for the ease of the subject, more than for the jurisdiction of the ordinary; which appears, in that, there is an action given to the subject, and penalty to the king for his vexation, but none to the ordinary." That this very clause says, it is to be done in cases only, &c. "which were a vain correction if it left it as general as before, i. e. if it were lawful or tolerable in all cases without cause."

The rule intended in the *Reformatio Legum*, was, "*Archiepiscopus potest eligi in iudicem a subditis suffraganeorum, licet suffraganei ignorent.*" Ref. Leg. f. 96. (a).

(2) *Out of the diocese*:—And that, as it seems, whether the see be full or vacant; for in the case of *Pickover* (Gibson's Codex, 1006.) it was resolved upon this statute, that if a bishopric within the province of Canterbury be void, and so the jurisdiction be devolved to the metropolitan, he must hold his court within the inferior diocese; for such causes as were by that law to be holden before the inferior ordinary; and the prothonotaries said, it had

PROCESS.

Stat. 23 Hen. 8.
c. 9.

Sect. 4.

Sect. 5.
Proviso for the
probate of
testaments in
the province of
Canterbury.

or is resident or abiding, ten pounds sterling; the one half thereof to be to the king our sovereign lord, and the other half to any person that will sue for the same in any of the king's said courts, or in any other the said temporal courts, by writ, information, bill, or plaint; in which action no protection shall be allowed, nor wager of law or essoin shall be admitted.

" Provided always that it shall be lawful to every archbishop (1) of this realm to call, cite, and summon any person or persons inhabiting (2) or dwelling in any bishop's diocese within his province, for causes of heresy, if the bishop (3), or other ordinary immediate thereunto consent, or if that the same bishop, or other immediate ordinary or judge, do not his duty in punishment of the same.

" Provided also that this act shall not extend in anywise to the prerogative of the most reverend father in God the Archbishop of Canterbury,

been so formerly resolved. *Tey v. Cox*, 2 Brownl. 35.

But a short period previously (11 Jac. 1.) the contrary had been resolved, *i. e.* where one was cited out of his diocese before the Archbishop of Canterbury, as guardian of the spiritualities, not only prohibition was denied, but it was further said, that if he had been cited before him as metropolitan, it would have been granted upon this statute. Gibson's Codex, 1006.

(1) *Every archbishop*: — The rule laid down in the *Reformatio Legum*, (f. 11. (b).) is as follows:—" Is qui vel accusatione, vel inquisitione, vel evangelica denunciatione, reus sit, quod aliquam hæresin aut affirmaverit, aut defenderit, aut prædicaverit, aut docuerit, coram episcopo vel archiepiscopo causam dicet. Qui verò loci privilegium habent, et exempti dicuntur, apud illos vel episcopos, vel archiepiscopos, causam dicent, intra quorum dioceses illorum exempti loci constiterint. Appellatio tamen reo conceditur, ab episcopo ad archiepiscopum, et ab archiepiscopo nostram ad regalem personam."

This is agreeable to the doctrine of the canon law (*Extra. l. 5. t. 7. c. 9.*):—" Si qui fuerint, qui à lege diocesanæ jurisdictionis exempti, soli subiaceant sedis apostolicæ potestati; nihilominus in his quæ sunt contra hæreticos instituta, episcoporum subeant judicium."

(2) *Inhabiting*: — An attorney in the King's Bench was sued in the Arches for a legacy; and as he inhabited in the diocese of Peterborough, prohibition was prayed and granted; because, though he remained in London during term time, he was properly inhabiting within the jurisdiction of the Bishop of Peterborough. *Axon*, 2 Brownl. 12

But in *Blackmore's case* (Hardr. 421.), where one was cited in the Archdeacon of Canterbury's Court for not coming to church at Biddendon, in the county of Kent, and pleaded that he was an inhabitant in the diocese of Chichester, the Court declared, " that if a man be cited within the diocese, though he be not an inhabitant there, but only comes there to trade, or otherwise, that

this is not within the stat. of 23 Hen. 8.; and that, if it were otherwise, there might be offences committed against the ecclesiastical law, which would not be punished at all: for men would offend in one county, and then remove into another, and so escape with impunity."

When the suit was for tithes in the diocese of Sarum, where they lay, and prohibition was obtained upon this statute, because the defendant inhabited in London; the Court, upon notice that the suit was for tithes, granted a consultation, and declared that that case was not within the statute. Gibson's Codex, 1806.; sed vide *Jones v. Boyer*, 2 Brownl. 27.

In *Machin v. Maulin* (2 Salk. 549. 1 Ld. Raym. 534.) it was holden under this statute, that if the cause of action be local, as for the subtraction of tithes, it must be prosecuted before the ordinary of the place where the wrong was done, but that it was otherwise in cases transitory, ubi forum sequitur reum. Vide etiam *Close v. Waterson*, Skin. 233.

(3) *The bishop*: — The right of the archbishop to cite, punish, and deprive bishops for spiritual offences was settled by the Court of King's Bench and the House of Lords in *St. David's (Bishop of) v. Lucy*, 1 Salk. 134. But it may not be improper to take notice, that according to the sense of the canon law, it is not regular to subject suffragans to the censure of the officers of an archbishop. " *Officiales autem remensis archiepiscopi (quandiu in sua provincia, vel circa illam extiterit) in suffraganeos interditi, suspensionis, vel excommunicationis proferre sententias non attentent. Et hoc idem ab officialibus aliorum metropolitano-rum, circa ipsorum suffraganeos (quibus ob reverentiam pontificalis officii deferri volumus in hac parte) præcipimus observari.*" 6 Decret. l. 1. t. 16. c. 1. And accordingly, Nix, bishop of Norwich, protested against the proceedings of the archbishop's commissary in his metropolitical visitation, because it was against the dignity of a bishop to be judged or proceeded against by a commissary. Cranm. 138, 139.

or any of his successors, of or for calling any person or persons out of the diocese where he or they be inhabiting, dwelling, or resident, for probate (1) of any testament or testaments.

Process.
Stat. 23 Hen.
c. 9.

“That no archbishop, nor bishop, ordinary, official, commissary, or any other substitute or minister of any of the said archbishops, bishops, archdeacons, or other having any spiritual jurisdiction, at any time from the feast of Easter next coming, shall ask, demand, take, or receive of any of the king's subjects, any sum or sums of money for the seal of any citation, after the said feast to be awarded or obtained, than only threepence sterling, upon the pains and penalties before limited, contained, and expressed in this present act, to be in like form recovered, as is aforesaid.

Sect. 6.
The fees for
the seal of a
citation.

“Provided always that this act be not in anywise hurtful or prejudicial to the Archbishop of York, nor to his successors, of, for, or concerning probate of testaments within his province and jurisdiction, by reason of any prerogative.”

Sect. 7.
Proviso for
probate of
testaments in
the province
York.

According to modern practice, a certificate of the return of the service of the citation is endorsed on that instrument, setting forth the day and place of its service on the party, signed by the person who served it: an affidavit of the truth of the certificate is also endorsed upon the instrument.

Return of
citation.

PROCTORS.

1. APPOINTMENT, pp. 1022, 1023.

Defined — How appointed — Stat. 5 Geo. 2. c. 18. s. 2. — No proctor to be a justice of the peace — Exempt from stat. 41 Geo. 3. c. 79. s. 14. — Stat. 10 Geo. 4. c. 7. s. 16. — Roman Catholics disqualified — Stat. 55 Geo. 3. c. 184. — Stamp duty on admission — Stat. 53 Geo. 3. c. 127. ss. 8, 9, 11 & 12. — Proctors allowing their names to be used by persons not entitled to act as proctors, to be struck off the roll — Penalty on persons exercising the functions of a proctor, not being duly enrolled as such — Recovery of penalties — Limitation of actions.

2. PROXIES, pp. 1023—1026.

Clients generally execute no proxies — Canon 129. — Proctors not to retain without the lawful assignment of the parties — According to modern practice, proxies not essential, except to secure the adverse party, and to protect the proctor — Effect of a proxy of consent — Persons by whom proxies may be given — Married women — Husbands for their wives — Guardian and minor — Removal of cause into another court — When proxy cannot be revoked — Proxy ceases upon the death of the party, or upon his personal appearance in court.

3. DUTIES AND RESPONSIBILITIES, pp. 1026—1027.

Canon 130. — Not to retain causes without the counsel of an advocate — Canon 131. — Not to conclude in any case without the knowledge of an advocate — Canon 133. — Not to be clamorous in court — Responsible for the purity of his proceedings — Guilty of extortion — Not obliged to answer foreign seals — Bound to restore deeds when his office has terminated — Client entitled to a detailed bill of costs — Court can order bill of costs to be taxed by the registrar — Mandamus will not lie to restore a proctor.

(1) For probate: — In *Hughe's case* (Godb. 214.), where one who dwelt in Somersetshire had made his will, and his executors were libelled against in the Arches; it was said by Mr. Justice Warburton, to have been agreed by all the justices, “that the exception in stat. 23 Hen. 8. c. 9. doth extend only to probate of wills,” and prohi-

bition was awarded. But in *Anon.* (1 Vent. 233.) where one was cited out of the diocese, to answer a suit for a legacy, into the prerogative court, where the will had been proved, prohibition was denied, because it was there, that the executors must give account and be discharged, &c.

APPOINTMENT.

I. APPOINTMENT.

Defined.

Proctors in the Ecclesiastical and Admiralty Courts perform analogous duties to those of solicitors and attorneys in the courts of law and equity. Thus, they are officers established to represent in judgment the parties who empower them (by warrant under their hands called a proxy) to appear for them, to explain their rights, to manage and instruct their cause, and to demand judgment; and they are seemingly exempt from serving the office of constable, or other inferior office, in the same manner as solicitors or attorneys belonging to the courts at Westminster. (1)

Stat. 5 Geo. 2.
c. 18. s. 2.

No proctor to
be a justice of
the peace.

Stat. 41 Geo. 3.
c. 79. s. 14.

Stat. 10 Geo. 4.
c. 7. s. 16.

Roman Catho-
lics disquali-
fied.

Stat. 55 Geo. 3.
c. 184.

Stamp duty on
admission.

But by stat. 5 Geo. 2. c. 18. s. 2. no proctor in any court is to be a justice of the peace during such time as he continues in the business and practice of a proctor.

By stat. 41 Geo. 3. c. 79. s. 14. nothing in that act regulating public notaries is to apply to a proctor in the Ecclesiastical Courts.

And by stat. 10 Geo. 4. c. 7. s. 16. Roman Catholics are excluded from office in the Ecclesiastical Courts.

By stat. 55 Geo. 3. c. 184. (2) every admission of any person to the office of proctor in any of the courts shall be upon a twenty-five pounds stamp. And every practising solicitor, attorney, notary, proctor, agent, or procurator must take out a certificate annually; upon which there shall be charged, if he reside in the City of London or Westminster, or within the limits of the twopenny post in England, or within the city or shire of Edinburgh, and shall have been admitted to his office three years, twelve pounds; if not so long, six pounds. If he shall reside elsewhere, and have been admitted three years, eight pounds; if not so long, four pounds: but no one person is obliged to take out more than one such certificate, though he may act in more than one of the above capacities, or in several of those courts.

Stat. 53. Geo. 3.
c. 127. ss. 8, 9,
11, & 12.

By stat. 53 Geo. 3. c. 127. ss. 8, 9, 11, & 12., "if any proctor of the Arches Court of Canterbury, or any other Ecclesiastical Court or Courts in which he shall be entitled to act as proctor, shall act as such, or permit or suffer

(1) "In order to entitle a person to be admitted a proctor to practise in the Court of Arches, it is required that he shall have served a clerkship of seven years, under articles, with one of the thirty-four senior proctors, who must be of five years' standing; and who, by the rules of the court, is prohibited from taking a second clerk, until the first shall have served five years; except, in the event of the death of a proctor, to whom a clerk may have been articulated, before the term of his clerkship is completed. In this case any other of the thirty-four senior proctors may take such clerk for the remainder of the term, although he himself may at the same time have a clerk of less than five years' standing. Before a clerk is permitted to be articulated, he is required to produce a certificate of his having made reasonable progress in classical education.

"When the term of seven years is completed, the party is admitted a notary, by a

faculty from the archbishop of Canterbury; a petition is then presented to his grace, accompanied by a certificate, signed by three advocates and three proctors, that the party applying to be admitted has served as articulated clerk to a proctor of the court for the full term of seven years. If this certificate is approved, the archbishop issues his fiat, and a commission is directed to the dean of the Arches, by whom the party is admitted under the title of a supernumerary, with similar ceremonies to those observed on the admission of an advocate.

"The proctor so admitted is qualified to commence business upon his own account immediately, but he is not entitled to take an articulated clerk until he shall have been for five years within the number of the thirty-four senior proctors." *Eccles. Com. Rep.* Feb. 15. 1832, p. 14.

(2) Sched. Part 1.

his name to be in any manner used in any suit, the prosecution or defence whereof shall appertain to the office of a proctor, or in obtaining probates of wills, letters of administration, or marriage licences to or for or on account or for the profit and benefit of any person or persons not entitled to act as a proctor, or shall permit or suffer any such person or persons to demand or participate in such profit and benefit, and complaint thereof shall be made to the court or courts wherein such proctor hath been admitted and enrolled, and proof given to the satisfaction of the said court or courts, that such proctor hath offended therein as aforesaid, then and in such case every such proctor so offending shall be struck off the roll of proctors, and be for ever after disabled from practising as a proctor, or be suspended from the office, function, and practice of a proctor in all and every the said court or courts for so long a period as the judge or judges of the said court or courts may deem fit, save and except as to any allowance or allowances, sum or sums of money, that are or shall be agreed to be made to the widows or children of any deceased proctor or proctors, by any surviving partner or partners of such deceased proctor or proctors."

"In case any person or persons shall in his or in their own name, or in the name of any other person or persons, make, do, act, exercise or perform any act, matter, or thing whatsoever in any way appertaining or belonging to the office, function, or practice of a proctor for or in consideration of any gain, fee, or reward, or with a view to participate in the benefit to be derived from the office, functions, or practice of a proctor, without being admitted and enrolled, every such person for every such offence shall forfeit and pay the sum of fifty pounds."

All pecuniary forfeitures and penalties imposed on any person for offences committed against the act can be sued for and recovered in any of the courts of record at Westminster by action of debt, bill, plaint, or information, with full costs of suit.

But if any action or suit be brought for anything done under the act, it must be commenced within three calendar months next after the fact committed, and be laid and tried in the city or county wherein the cause of action has arisen; and the defendant in such action or suit can plead the general issue, and give the act and the special matter in evidence at any trial to be had thereupon.

APPOINTMENT.

Proctors allowing their names to be used by persons not entitled to act as proctors, to be struck off the roll.

Sect. 9.
Penalty on persons exercising the functions of a proctor, not being duly enrolled as such.

Sect. 11.
Recovery of penalties.

Sect. 12.
Limitation of actions.

2. PROXIES.

PROXIES.

Clients generally execute two proxies; one authorising the proctor to institute, the other to withdraw, proceedings. They are signed by the parties, attested by two witnesses, and deposited in the registry of the Court. The proctor, till such power be withdrawn, is dominus litis. (1)

Clients generally executed two proxies.

Canon 129. "None shall procure in any cause whatsoever, unless he be thereunto constituted and appointed by the party himself, either before the judge, or by act in court; or unless, in the beginning of the suit, he be, by a true and sufficient proxy thereunto warranted and enabled. We call that proxy sufficient, which is strengthened and confirmed by some authen-

Canon 129.
Proctors not to retain without the lawful assignment of the parties.

(1) 3 Burn's E. L. 376.

PROXIES.

seal, the party's approbation, or at least his ratification therewithal concurring. All which proxies shall be forthwith by the said proctors exhibited into the court, and be safely kept and preserved by the registrar in the public registry of the said court. And if any registrar or proctor shall offend herein, he shall be secluded from the exercise of his office for the space of two months, without hope of release or restoring."

"Whereas a custom is said to prevail, that he who is cited to a certain day constitutes a proctor for that day without letters, or by letters not sealed with an authentic seal; by which means it happeneth, that whilst such proctor will not prove his mandate, or confirm his letters by witnesses, or some other impediment comes in the way, nothing is done that day, nor on the following day, the proctor's office being at an end; and so all former diligence is lost without any effect. As a caution against this fallacy, we do ordain, that for the future a special proctor be constituted absolutely without any limitation of time; or if he be constituted for the day, yet not for one day only, but for several days, to be continued if need be. And the mandate shall be proved by an authentic writing, unless he be constituted in the acts of court, or the constitutor cannot easily find an authentic seal. (1)

"We do ordain, that no dean, archdeacon or his official, or bishop's official, shall set his seal to any proxy, unless it be publicly requested of him in court, or out of court, when he who constituteth the proctor, and is known to be the principal party, is present, and personally requesteth it. And whatsoever dean, archdeacon or his official, or official of the bishop, shall do the contrary out of certain malice, shall be *ipso facto* suspended from his office and benefice for three years. And if any advocate shall procure a false proxy to be made, he shall be suspended for three years from his office of advocate, and be disabled to hold any ecclesiastical benefice, and if he be married or bigamus, he shall be excommunicated *ipso facto*; and whatever shall be done by virtue of such false proxy shall be utterly void to all intents and purposes, and the proctor who was the chief actor in such falsity shall be for ever repelled from executing any legal act. And all of these, nevertheless, if they shall be convicted, shall be bound to render damages to the party injured." (2)

According to modern practice, proxies not essential, except to secure the adverse party, and to protect the proctor.

By modern practice a proxy is not essential, except to secure the adverse party, and to protect the proctor himself; because, supposing there was no regular proxy, that would not render the proceedings of a proctor null and void, unless it could be proved that there was no authority *de facto*, and that the principal was ignorant that the cause was in progress, and had thus lost the opportunity of defending himself. (3)

Indeed the exhibition of letters of administration have been held to amount to a proxy. (4)

Effect of a proxy of consent.

Where a proxy of consent has been given, and a sentence of a court of competent jurisdiction has been founded upon it, such sentence is conclusive; unless it can be strongly shown that such proxy was obtained by fraudulent misrepresentation, concealment, or contrivance, or perhaps by surprise. (5)

(1) Otho, Athol, 61.

(2) Lyndwood, Prov. Const. Ang. 76.

(3) *Prankard v. Ducl*, 1 Hagg. 186.

(4) *Kirkhouse v. Fawcener*, 2 Lee (Sir G.), 531.

(5) *Watkin v. Brent*, 1 Curt. 264.

Where in *Fullerton v. Dixon* (1) the proctor of one of several executors having been cited to take probate, and he having alleged that he was ready to do so, it was objected that he had no proxy: the Court said, "What need is there of a proxy authorising the proctor to allege this? It would be a singular thing for the Court to require such a proxy. The act of taking probate will be the best confirmation of the proctor's allegation."

PROXIES.

As to the persons by whom a proxy may be given, it has been decided that a woman, though married, may, under circumstances, give a proxy. Thus—Mary Suter being named sole executrix, was permitted to appoint a proctor, in the absence of her husband, in order to her proceeding to prove in solemn form of law the last will and testament of John Rayner, in which she was named executrix, upon an affidavit, which stated in substance that her husband had left this country for the Cape of Good Hope, where she believed he had now taken up his permanent residence eleven years since, from which time she had received no pecuniary assistance from him; that there was no probability of his return to this country, and that he had refused to execute the necessary documents to enable his wife to proceed in the cause. (2)

Persons by whom proxies may be given
Married women.

But generally, in cases of married women, there must be some security for costs; and the husband must, therefore, join in the proxy, especially where the parties are in low circumstances. (3)

In *Shadbolt v. Waugh* (4), where one of the parties, claiming as a legatee, was a feme covert, living apart from her husband, on her separate property, the court, on security for costs being given, accepted her sole proxy.

Where an administratrix, cited by the next of kin to exhibit an inventory and account, and to see portions allotted, appeared to the citation, and called for a proxy from the next of kin; a proxy signed only by the husband, the wife next of kin refusing to give a proxy or appear, and living apart from her husband, was held sufficient. (5)

Husbands for their wives.

It seems to have been decided, that the guardian of a minor instituting a suit, cannot be condemned in the costs, incurred after a proxy has been exhibited, the party having become of full age. (6)

Guardian and minor.

Where a proxy was given to appear in the archidiaconal court, and in consequence of the death of the archdeacon, the proceedings were moved into the episcopal court, and there went on to sentence, no new proxy was necessary for the proctor to enable him to proceed in the episcopal court, the client being aware in fact that he was so proceeding. (7)

Removal of cause into another court.

So where a proxy was given by a husband in India to institute proceedings in the Court of Exeter against his wife, it was held that the wife having changed her residence before the commencement of the suit into another diocese, the Court might proceed under letters of request from the diocese in which she was resident, without a new proxy. (8)

After contestation of suit a proxy cannot be revoked without just cause given. (9)

When proxy cannot be revoked.

(1) 4 Hagg. 402.

(2) *Suter v. Christie*, 2 Add. 150.

(3) *Arbery v. Ashe*, 1 Hagg. 219.

(4) 3 Ibid. 570. *in not.*

(5) *Cook v. Cowper*, 2 Lec (Sir G.), 388.

497. For the form of a proxy in a crimi-

nal suit, vide *Watson v. Thorp*, 1 Phil. 373. *in not.*

(6) *Green v. Proctor*, 1 Hagg. 337.

(7) *Prankard v. Deacle*, *ibid.* 169.

(8) *Hawkes v. Hawkes*, *ibid.* 194.

(9) *Ayliffe's Parergon Juris*, 428.

PROXIES.

Proxy ceases upon the death of the party, or upon his personal appearance in Court.

As a proxy is only a personal appointment, the authority of a proctor ceases on the death of a party in the cause, by whom he was appointed, and by whose death the cause abates. (1) So if the party appear personally. (2)

DUTIES AND RESPONSIBILITIES.

Canon 130. Not to retain causes without the counsel of an advocate.

Canon 130. "For lessening and abridging the multitude of suits and contentions, as also for preventing the complaints of suitors in courts ecclesiastical, who many times are overthrown by the oversight and negligence, or by the ignorance and insufficiency, of proctors, and likewise for the furtherance and increase of learning, and the advancement of civil and canon law, following the laudable custom heretofore observed in the courts pertaining to the Archbishop of Canterbury, we will and ordain that no proctor exercising in any of them shall entertain any cause whatsoever, and keep and retain the same for two court days, without the counsel and advice of an advocate, under pain of a year's suspension from his practice; neither shall the judge have power to release or mitigate the said penalty without express mandate and authority from the archbishop aforesaid."

Canon 131. Not to conclude in any case without the knowledge of an advocate.

Canon 131. "No judge in any of the said courts of the archbishop, shall admit any libel, or any other matter, without the advice of an advocate admitted to practise in the same court, or without his subscription; neither shall any proctor conclude any cause depending, without the knowledge of the advocate retained and feed in the cause; which, if any proctor shall do, or procure to be done, or shall by any colour whatsoever defraud the advocate of his duty or fee, or shall be negligent in repairing to the advocate, and requiring his advice what course is to be taken in the cause, he shall be suspended from all practice for the space of six months, without hope of being thereunto restored before the said term be fully complete."

Canon 133. Not to be clamorous in Court.

Canon 133. "Forasmuch as it is found by experience, that the loud and confused cries and clamours of proctors in the court of the archbishop are not only troublesome and offensive to the judges and advocates, but also give occasion to the standers-by, of contempt and calumny toward the Court itself; that more respect may be had to the dignity of the judge than heretofore, and that causes may more easily and commodiously be handled and dispatched, we charge and enjoin, that all proctors in the said courts do especially intend, that the acts be faithfully entered and set down by the registrar, according to the advice and direction of the advocate; that the said proctors refrain loud speech and babbling, and behave themselves quietly and modestly; and that when either the judges or advocates, or any of them, shall happen to speak, they presently be silent, upon pain of silencing for two whole terms then immediately following every such offence of theirs; and if any of them shall the second time offend herein, and after due monition shall not reform himself, let him be for ever removed from his practice."

(1) *Cheale v. Cheale*, 1 Hagg. 374. (2) *Heyes v. Exeter College, Oxford*, 12 Ves. 346.

In *Leigh's case* (1), a proctor of Doctors' Commons, who had done business without the advice of an advocate, contrary to the canon, and refused to pay a tax of 10s. imposed upon him by order of the Court to war the charges of the house, was suspended from his office, and who then applied for a mandamus to be restored; but it was denied, and the Court said, that "officers are incident to all courts, and must partake of the nature of those several and respective courts in which they attend; and the judges, or those who have the supreme authority in such courts, are the proper persons to censure the behaviour of their own officers; and if they should be mistaken, the King's Bench cannot relieve; for in all cases where such judges keep within their bounds, no other court can correct their errors in proceedings."

A proctor is dominus litis, and therefore responsible to the Court for the purity of his proceedings. (2)

Responsible for the purity of his proceedings.

Where a party regularly complains of gross extortion by his proctor, the Court may punish the proctor by suspension or otherwise. (3)

Guilty of extortion.

In a case where a proctor had charged 88*l.* 4*s.* 4*d.*, and the bill was referred to the registrar, who reported the proper charge to be 52*l.* 15*s.* 8*d.*, the Court suspended the proctor for three months, and condemned him in costs; in this case it was the first time his conduct had been brought before the Court, and there were other extenuating circumstances. (4)

As soon as a proctor has finished his office or business (5), an action ex mandato lies according to the civil law, in order to compel a restitution of whatever he has received from or out of the suit, though acquired by the mistake or iniquity of the judge. He can, likewise, be compelled to restore all writings and instruments concerning the cause, and to make good whatever damage his client has sustained by his neglect or deceit. (6)

Bound to restore deeds, when his office has terminated.

A client is, under all circumstances, entitled to a detailed bill of costs from his proctor; and where it has been long acquiesced in, and payment made after the close of the suit, he is not entitled to have it referred to the registrar for examination. (7)

Client entitled to a detailed bill of costs.

The Court has no power to decide what expenses are due between proctor and client, or to enforce payment of them; but where costs are given against a party, the Court, in order to carry its sentence into execution, is empowered to tax the costs, and to enforce their payment. All that the Court can do in the case of proctor and client is to refer the bill to the registrar for his examination; this is merely in aid of justice, and for the convenience of suitors. (8)

Court can order bill of costs to be taxed by the registrar.

The writ of mandamus will not be issued to restore a proctor of Doctors' Commons, because it is an ecclesiastical office, and a matter properly and only cognisable in the Ecclesiastical Courts.

Mandamus not lie to restore a proctor.

(1) 3 Mod. 332. Gibson's Codex, 995.

(2) *Mynn v. Robinson*, 2 Hagg. 195.

(3) *Prentice v. Prentice*, 3 Phil. 311. *Peddle v. Evans*, 1 Hagg. 689.

(4) *In the goods of Lady Hatton Finch*, 3 ibid. 255.

(5) A proctor is not obliged to answer to foreign seals, and to the subscription and seals of foreign notaries; the rule of a proctor's answering extends only to the seals of courts in England, and to the seals and sub-

scriptions of English notaries, with which the law supposes him to be acquainted. *Raymond v. Watteville* (*Baron Von*), 2 Lee (Sir G.), 555.

(6) Ayliffe's Parergon Juris, 427.

(7) *Peddle v. Toller*, 3 Hagg. 296.

(8) Ibid. 297, 298.; sed vide *Prentice v. Prentice*, 3 Phil. 311. *Peddle v. Evans*, 1 Hagg. 689. *In the goods of Lady Hatton Finch*, 3 ibid. 255.

PROFANENESS. (1)

PROHIBITION.

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2. WHAT COURTS CAN GRANT A PROHIBITION, pp. 1030, 1031.
3. TO WHAT COURTS A PROHIBITION MAY BE AWARDED, pp. 1031—1033.
4. THE STATUTES, p. 1033.
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Awarding a prohibition is a matter discretionary—Where inferior courts assume any improper jurisdiction—An ecclesiastical citation will be bad, if it describe no ecclesiastical offence—Judgment of Lord Denman in FRANCIS v. STEWARD—Where it appears on the face of the proceedings, that the Ecclesiastical Court is about to try matters which are triable only at common law—Determining the construction of an Act of Parliament otherwise than the common law requires—IF THE POWER OF THE ECCLESIASTICAL COURT BE DERIVED FROM A STATUTE, THE EXERCISE OF IT IS STRICTLY LIMITED—ECCLESIASTICAL COURTS CANNOT DECIDE QUESTIONS OF FREEHOLD OR THE RIGHTS OF INHERITANCE—Cutting trees in the churchyard—Breaking a church wall—Feoffment of tithes—Legatees suing in the Ecclesiastical Court for their shares under a will—Rent devised out of a farm for years—THE RIGHTS OF OFFICES FOR LIFE—WHEN THE SPIRITUAL COURTS CAN AND CANNOT TRY CUSTOMS—In cases of prescription the matter is solely determinable at common law—Where a custom or prescription is admitted by the pleadings—A parson may be bound to an ecclesiastical duty by custom—When the subject of the suit is within the jurisdiction of the Spiritual Court, a mere suggestion of a custom is no ground for a prohibition—BOUNDARIES OF PARISHES CANNOT BE TRIED BY THE ECCLESIASTICAL COURTS—Where tithes alleged to be in a different parish from that in which they are claimed—Suit between rector and vicar respecting tithes—Bounds of two vills lying in the same parish—Ecclesiastical Court cannot compel a rector and parishioners to give up a part of their churchyard—Where the boundaries of a churchyard are disputed—RIGHT OF CHURCH-WAY—Churchwardens cannot sue for a church-way—Intrusion upon aisles—Disturbance of church seats—Repairing of church seats—Ordering seats exclusive of the ordinary—Spiritual Court cannot try the existence of a vicarage—Suit in Ecclesiastical Court to avoid institution, or questioning the right to the incumbency—Bishops cannot decide upon the right of election for a LECTURER—Election of PARISH CLERKS—Election of CHURCHWARDENS—Ecclesiastical Court can compel churchwardens to deliver in their accounts, but have no jurisdiction to examine them—Churchwardens improperly taking away the church goods—Legality of a select vestry may be tried incidentally to the principal matter of a suit in the Ecclesiastical Courts—CHURCH RATES—Rate made by the churchwardens after majority of parishioners have refused to make one—A cause for subtraction of church rates is within the exceptive part of stat. 23 Hen. 8. c. 9.—When validity of church rate is disputed, proceedings may be commenced in the Arches Court, by letters of request from the commissary of the bishop of the diocese—Where a custom for a church rate is denied in the Ecclesiastical Court—Custom for assessing rates to repair the church—Inhabitants of a chapelry can only be discharged by prescription from repairing their own chapel—Where the jurisdiction of the Ecclesiastical Court is not affected by stat. 53 Geo. 3. c. 127. s. 7.—Where a libelled party has refused to pay

(1) *Vide ante*, tit. BLASPHEMY AND PROFANENESS.

church rates, because certain statutes have not been complied with— Fees of chancellors, apparitors, proctors, parish clerks, or registrars — Proctor can be ordered to refund money in his hands — Ecclesiastical Court proceeding to hear exceptions at the suit of a legatee to an inventory exhibited by an executrix — Granting administration under a doubtful power — Legatee taking a bond from the executor, and afterwards suing for the legacy in the Ecclesiastical Court — PARTY SUED IN THE SPIRITUAL COURT FOR THAT WHICH WOULD, AT COMMON LAW, SUPPORT DEBT, TRESPASS, OR TROVER — SLANDER — SPIRITUAL COURTS HAVE NO JURISDICTION AS TO CRIMES AND CAPITAL OFFENCES — A clerk convicted of homicide or manslaughter — Matter of ecclesiastical cognisance made felony or treason by statute — Woman pleading bigamy by her husband — Libel — Perjury — Layman forging orders, and acquiring a benefice — Offences punishable in the laity — Assaulting and beating a clergyman — Stat. 27 Geo. 3. c. 44. applies to laymen and clergymen — Parish clerk guilty of scandalous offences — Adultery — Incontinency — A PROHIBITION WILL NOT BE GRANTED WHERE THE CONSEQUENCES WILL NOT BE MATERIAL — Mere irregularity of practice — Where no good significavit could issue on a defective sentence — When parties have a remedy by indictment — IT WILL NOT BE PRESUMED THAT THE COURT BELOW WILL DECIDE CONTRARY TO LAW — Judgment of Lord Denman in GRIFFIN V. ELLIS — WHERE THE JURISDICTIONS ARE CONCURRENT, THE SPIRITUAL COURT, IF FIRST POSSESSED OF A CASE, WILL NOT BE HINDERED FROM PROCEEDING IN IT — Prohibition not grantable in matters purely spiritual — Stat. 13 Edw. 1. st. iv. — No prohibition to be found in the register, or elsewhere, concerning the questioning of any marriage in the Spiritual Courts — Prohibition does not seemingly lie against a bishop to restrain him from committing waste, or to restrain the ordinary from granting a faculty for stopping up a church window and erecting a monument — Prohibition will, in some cases, be granted, although the original subject is within the ecclesiastical jurisdiction — Refusal of the copy of a libel in the Ecclesiastical Court — Spiritual Court will not be hindered from proceeding by the canon law, unless it be in derogation from the common law — If a libel be exhibited for two distinct things, the one of which is of ecclesiastical cognisance, and the other not, a prohibition will only be granted as to that which is of temporal cognisance — Trying temporal incidents by the rules of the common law — If the principal matter be of ecclesiastical cognisance, things dependent thereon will be so too — Temporal loss ensuing upon a spiritual sentence — When prohibition will not be granted under stat. 1 & 2 Vict. c. 106. — Judgment of Lord Denman in RACKHAM V. BLUCK.

7. PROHIBITION AFTER SENTENCE — JUDGMENT — WRIT OF ERROR, pp. 1065—1068.

8. MODE OF ACQUIRING THE WRIT AND HEREIN OF THE PLEADINGS, pp. 1068—1071.

9. CONTEMPT OF THE WRIT, pp. 1071, 1072.

10. DAMAGES AND COSTS, pp. 1072—1075.

1. DEFINED.

DEFINED.

As all external jurisdiction, whether ecclesiastical or civil, is derived from the Crown, and the administration of justice is committed to a great variety of courts; hence it has been the care of the Crown that these courts keep within the limits and bounds of their several jurisdictions prescribed them by the laws and statutes of the realm. And for this purpose the writ of prohibition was framed, which issues out of the superior courts of common law to restrain inferior courts, whether such courts be temporal, ecclesiastical, maritime, or military, upon a suggestion that the cognisance of the matter belongs not to such courts; and in case they exceed their jurisdiction, the officer who executes the sentence, and in some cases

DEFINED.

the judges that give it, are in such superior courts punishable, sometimes at the suit of the queen, sometimes at the suit of the party, sometimes at the suit of both, according to the nature of the case.

The object of prohibitions in general is, the preservation of the right of the queen's crown and courts, and the ease and quiet of the subject. For it is the wisdom and policy of the law to suppose both best preserved, when every thing runs in its right channel, according to the original jurisdiction of every court; for by the same reason that one court might be allowed to encroach, another might, which could produce nothing but confusion and disorder in the administration of justice.

So that prohibitions do not import that the ecclesiastical or other inferior temporal courts are alia than the queen's courts, but signify that the cause is drawn ad aliud examen than it ought to be; and therefore it is said in all prohibitions, be the court ecclesiastical or temporal to which they are awarded, that the cause is drawn ad aliud examen contra coronam et dignitatem regiam. (1)

WHAT COURTS
CAN GRANT A
PROHIBITION.

2. WHAT COURTS CAN GRANT A PROHIBITION.

The queen's superior courts of Westminster have a superintendency over all inferior courts of what nature soever, and are by law intrusted with the exposition of such laws and acts of parliament as prescribe the extent and boundaries of their jurisdiction; so that if such courts assume a greater or other power than is allowed them by law, or if they refuse to allow acts of parliament, or to expound them otherwise than according to the true and proper exposition of them, the superior courts will prohibit and control them. (2)

In such superintendency the power of the Court of Queen's Bench has never been questioned; in fact, in the case of the *Company de Horners in London* (3) it was expressly said, "Que est le proper power et honnor de Ba. Re. a limiter les jurisdictions de tous autres courts;" and in *Rotheram v. Fanshaw* (4) Lord Hardwicke is reported to have said, that where the Ecclesiastical Court proceeds to try a custom by a different evidence from that which the common law courts would have done, no other court has the cognisance of it but the Court of Queen's Bench.

Jurisdiction of
the Courts of
Common Pleas
and Exchequer.

In *Bushell's case* (5) it was stated, that "all prohibitions for encroaching jurisdiction issue as well out of the Common Pleas as King's Bench." (6)

The jurisdiction of the Courts of Common Pleas and Exchequer in cases of prohibition, received an unquestionable recognition from 12 Co. 109.; where it appears, that, "by commandment of the king, the justices of the King's Bench and the barons of the Exchequer, were assembled before the Lord Chancellor Elsmere at York House, to deliver their opinions, whether there

(1) 6 Bac. Abr. tit. *Prohibition*, 564. 2 Inst. 601, 602. F. N. B. 40. *Roberts' case*, 12 Co. 65. *Rex v. Betterton*, Skin. 628. *Warner (Sir Henry) v. Suckerman*, 3 Bulst. 120. 1 Rol. 252.

(2) F. N. B. 43. 45. 4 Inst. 231. 249. *Company de Horners in London*, 2 Rol. 471. 6 Bac. Abr. tit. *Prohibition* (1), 583.

Hutton's case, Hob. 15. *Anon.* 1 P. Wms. 476. *Exp. Tucker in re Inman*, 1 M. & G. 529. *Tucker v. Inman*, 4 ibid. 1074.

(3) 2 Rol. 471.

(4) 3 Atk. 628.

(5) Vaugh. 157.

(6) Vide etiam *Lingdale's case*, 12 Co. 58. 4 Inst. 99. *Anon.* 2 Brownl. 17.

was any authority in our books, that the justices of the Common Bench may, upon information to the Court, grant prohibitions, or whether of necessity every plea ought to be pending in the Court for such cause, and the king would know their opinions in this case;” and the judges “ did deliver their opinions to the said lord chancellor, that the precedents of each Court are sufficient warrants for their proceedings in the same court; and therefore as well in the King’s Bench, in the Exchequer, as in the Common Bench, the judicial precedents in them are good warrants of their proceedings; and therefore for a long time, and in many successions of reverend judges, prohibitions upon informations, without any other plea pending, have been granted, issues tried, verdicts and judgments given upon demurrer, all which being in force, they were unanimously agreed to give no opinion against the jurisdiction of the Court of the Common Bench in this case.”

WHAT COURTS
CAN GRANT A
PROHIBITION

In *Pigott v. J’Aanson* (1) the lord keeper said, “ If an instrument comes before me which appears not to be an act inter vivos, in order to found a decree upon it as a testamentary act, it must be proved in the Spiritual Court. But if they prove there what is an act inter vivos, this Court will consider the probate as void, and coram non judice, as much as if they had proved a will relative to lands only. And this Court and every court of law supervises the acts of the Spiritual Court, where they are incidental to their determinations.” And it has been said, that the lord chancellor will relieve a party who has no remedy by appeal. (2)

Judgments of
the Ecclesiastical
Courts subject to the
equity of the
Court of
Chancery.

A prohibition can be issued from the Court of Chancery as well in vacation as in term time; but it is returnable into the Queen’s Bench or Common Pleas (3); and if the process of the Court of Equity be not obeyed, that Court can grant an attachment upon the prohibition, returnable either in the Queen’s Bench or Common Pleas. (4)

3. TO WHAT COURTS A PROHIBITION MAY BE AWARDED.

TO WHAT
COURTS A PROHIBITION
MAY BE AWARDED.

Prohibitions are grantable to almost every Court which differs from the common law in their proceedings.

A prohibition can be issued to any of the inferior courts of common law, as to the courts of the counties palatine (5), the county courts or courts baron (6), to justices (7), and the cinque ports. (8)

It may be directed to the courts christian, the university courts (9), the courts of chivalry, the Court of Admiralty, to naval and military court-martials (10), and to bishops. (11)

(1) 1 Eden, 471.

(2) 1 Ch. Ca. 200. 3 Burn’s E. L. by Phillimore, 388.

(3) *Blackborough v. Davis*, 1 P. Wms. 43.

(4) 4 Inst. 81.

(5) *Faughan v. Evans*, 2 Ld. Raym. 1408. 2 Rol. Abr. *Prohibition*, 318. pl. 3. *Warner (Sir H.) v. Sucherman*, 3 Bulst. 119.

(6) *Finch’s Law*, 451.

(7) *Pomfraye’s case*, Lit. 163.

(8) *Curling v. Long*, Comb. 261.

(9) *Richardson’s case*, cit. 6 Bac. Abr. *Prohibition* (1), 584. *Brudwell’s case*, Lit. 10.

(10) *Grant v. Gould (Sir Charles)*, 2 Hen. Black. 100. *Rowland v. Hockenhulle*, 1 Ld. Raym. 698.

(11) *Chichester (Bishop of) v. Harward*, 1 T. R. 650.

TO WHAT
COURTS A PRO-
HIBITION MAY
BE AWARDED.

The superior
courts can issue
the writ to the
Judicial Com-
mittee of the
Privy Council.
It will not be
presumed that
the judicial
committee will
act incorrectly.

A prohibition lies to the convocation (1), and it lay to the High Commis-
sion Court. (2)

It seems that the superior courts of Westminster can issue a prohibition to
the Judicial Committee of the Privy Council, if they act contrary to the ge-
neral law of the land (3), because prohibitions were issued under such circum-
stances to the High Court of Delegates (4) and to the Court of Review. (5)

It will not be presumed that the judicial committee will act incorrectly.
Thus, in a suit by *C. and H.*, churchwardens, against *F.*, for non-payment
of church rates, a libel, answer, and reply were put in, and certain articles
were exhibited by the churchwardens with, and in support of, the reply.
The articles were rejected in the Consistory Court, but, on appeal to the
Arches Court, they were admitted. *F.* then appealed to the privy council,
and his appeal was referred to the judicial committee. While the appeal
was depending, but before any proceedings had been taken in that court,
F. moved for a prohibition, on the ground that the rate was bad, on the
ground of its being retrospective, and appeared to be so from facts stated
on the pleadings: — It was held, that a prohibition could not be granted on
this ground, the cause being before a court, the jurisdiction of which was
not denied, no erroneous proceeding having been taken there, and the
Court of Queen's Bench refusing to presume that the judicial committee
would act incorrectly. (6)

Although it seems that the Court of Exchequer will issue a writ of pro-
hibition to the Judicial Committee of the Privy Council, if they exceed their
jurisdiction, it will not issue the writ for that which is a subject of
appeal (7), or upon a mere question of practice.

Where Judicial
Committee of
Privy Council
have jurisdic-
tion over a
cause, and have
retained it, the
Court will not
interfere as to a
matter of prac-
tice.

In a suit for a divorce in the Consistory Court in London, the defendant
put in an answer under protest, which protest was afterwards overruled;
but the Court refused to compel the defendant to appear absolutely, or to
admit the plaintiff's libel. The plaintiff appealed to the Court of Arches
from that decision, but not in due time; and the appeal was dismissed.
The plaintiff afterwards applied to the Consistory Court, to be allowed to
correct her libel; but the Court refused the application. The plaintiff ap-
pealed from that decision to the Court of Arches, who pronounced in favour
of the appeal. From that decree the defendant appealed to the king in
council, praying that it might be reversed, the cause retained, and he be
dismissed from all observance of justice therein. The plaintiff also prayed
that the cause might be retained. The appeal was referred to the Judicial
Committee of the Privy Council, who reported in favour of the appeal,
that the decree ought to be reversed, and the principal cause retained, but
that the defendant should appear absolutely. The report was confirmed,
and the order for the appearance was made and served upon the de-
fendant. On a motion for a prohibition to the judicial committee it was
held, that, as the judicial committee had jurisdiction over the cause, and

(1) Si concilium teneant de aliquibus
quæ ad coronam regis pertinent, vel quæ
personam regis, vel statum suum, vel sta-
tum concilii sui contingunt. 4 Inst. 322.
6 Bac. Abr. tit. *Prohibition* (1), 583.

(2) 4 Inst. 333. *Howson's case*, Lit. 152.
189. 274.

(3) *Ex parte Smyth*, 2 C. M. & R. 748.
3 A. & E. 719.

(4) *Brabin v. Trediman*, 2 Rol. 24.

(5) 4 Inst. 341.

(6) *Chesterton v. Farlar*, 7 A. & E. 713.

(7) *Ex parte Smyth*, 2 C. M. & R. 748.

had retained the cause, it was a step taken in the cause; and, if wrong, that it was a matter of practice over which the Court had no jurisdiction. (1)

TO WHAT
COURTS A PRO-
HIBITION MAY
BE AWARDED.

4. THE STATUTES.

THE STATUTES.

The principal statutes relating to prohibitions (2) are stat. 13 Edw. 1. st. iv. c. 1.; stat. 9 Edw. 2. st. i. c. 1.; stat. 18 Edw. 3. st. iii. c. 5.; stat. 45 Edw. 3. c. 3.; stat. 50 Edw. 3. c. 4.; stat. 2 & 3 Edw. 6. c. 13.; stat. 8 & 9 Gul. 3. c. 11.; stat. 1 Gul. 4. c. 21. & stat. 9 & 10 Vict. c. 113. (Ir.)

5. PARTIES.

PARTIES.

The queen can sue for a prohibition, notwithstanding the plea in the Spiritual Court be between two common persons, because the suit is in derogation of her crown and dignity. (3)

The queen can
sue for a prohi-
bition.

If the Ecclesiastical Court hold plea of any matter which does not belong to their jurisdiction, upon information thereof to the queen's courts, either by the plaintiff (4), defendant, or by a mere stranger, a prohibition will issue. (5)

Any person
may pray a
prohibition.

If there be a judgment against a simonist, who by the assent of the parties is to continue for a certain time on the benefice, and who at the expiration of the time refuses to remove, but commits waste on the house or glebe, a prohibition to stay his doing waste may be had by the patron, incumbent, or any other person, because it is the king's writ, and any one may pray a prohibition for the king, and it is grantable ex debito justitiæ, and not in the discretion of the court. (6)

Patron or in-
cumbent to stay
waste.

In a libel in the Spiritual Court by the husband and wife, for calling the husband cuckold, Chief Justice Holt held that "a prohibition should go, because husband and wife cannot both sue in that court for that word," but the wife only, the imputation being upon her; and the husband and wife by the spiritual law cannot join in a suit in the Ecclesiastical Court as they must do in the temporal, but each must sue separately upon their own cause of action. (7)

Husband and
wife.

If several libels be exhibited against A. and B. in a matter in which the court have not conusance, A. and B. cannot join in a prohibition; and so if the griefs be several. (8)

Several libels
exhibited
against A. and
B., in a matter
where the Court
has not conu-
sance, they can-
not join in a
prohibition.

But where the vicar of A. libelled several persons severally for tithes who joined in a prohibition, suggesting a modus; though the Court held that the prohibition was not regularly brought, as it was in all their names when there were several libels, yet inasmuch as this was on a custom, and matter triable at common law, in which the Ecclesiastical Court was properly prohibited, though not in exact form, they refused to

(1) *Ex parte Smyth*, 2 C. M. & R. 748.

(2) *Vide* Stephens' Ecclesiastical Sta-
tutes, 24. 33. 51. 72, 73. 314. 666. 1442.

(3) F. N. B. 40.

(4) *Chesterton v. Furlar*, 7 A. & E. 713.

(5) 2 Inst. 607.

(6) 6 Bac. Abr. tit. *Prohibition* (B),
567.

(7) *Anon.* 3 Salk. 288. *Tarrant v. Mawr*,
1 Str. 576.

(8) *Anon.* Noy, 131. *Kadwalader v.*
Bryan, Cro. Car. 162.

PARTIES.

Plaintiff, or defendant, may have a prohibition to stay his own suit.

award a consultation, but directed that the parties should put in several declarations, as if there had been several prohibitions. (1)

The plaintiff, as well as the defendant, can in the Spiritual Court have a prohibition to stay his own suit; because if the temporal courts by any means acquire information that the Spiritual Court meddle with temporal trials, a prohibition will be awarded. (2)

Thus, when Archbishop Bancroft alleged that the plaintiff having made choice thereof, and brought his adversary there into trial, should by all intendment of law and reason, and by the usage of all other judicial places, thereby conclude himself in that behalf; yet the answer of the judges was, that none may pursue in the Ecclesiastical Court for that which the king's court ought to hold plea of; but upon information thereof given to the king's courts, either by the plaintiff, or by any mere stranger, they are to be prohibited, because they deal in that which appertaineth not to their own jurisdiction. (3)

Parson appropriate.

If a vicar sue a parishioner for tithes in the Spiritual Court, and the parson appropriate appear there (4) *pro interesse suo*, and pray a prohibition, it will be granted. (5)

Reversioner.

If lessee for years be sued in the Spiritual Court for tithes, he in reversion may have a prohibition. (6)

Party must appear in Ecclesiastical Court, before he can have the writ.

No man is entitled to a prohibition, unless he be in danger of being injured by some suit actually depending; consequently, a defendant cited in the Ecclesiastical Court must appear before he can apply for the writ (7): and upon a petition to the archbishop, or other ecclesiastical judge, no prohibition lies. (8) Neither does a prohibition *quia timet lie*. (9)

Where a testator died indebted to an attorney for law expenses, including the preparation of his will, which was left in the custody of the attorney, the Prerogative Court having cited the attorney, at the instance of the personal representatives, to bring in the will, and leave it in the registry of that court, the Court of King's Bench refused, in this stage of the proceedings, to interfere by prohibition, on the ground of the attorney's lien on the will.

A stranger cannot have the writ against a bishop.

A stranger cannot have an original writ of prohibition against a bishop to restrain him from committing waste in the possession of his see. (10)

Where B. and C. are libelled against for defamation.

So if A. libels against B. and C. for defamation, and they sue a prohibition, they must join in attachment upon it; and it is no objection to say, that the defamation was several. (11)

Where two join in a prohibition, and one dies.

Where two or more are allowed to join in a prohibition, and one of them dies, the writ will not abate; because nothing is by them to be recovered, but they are only to be discharged. (12)

(1) *Burges v. Ashton*, Yelv. 128. *Bartue's case*, Owen, 13.

(2) *Stranham v. Medcalf*, 1 Leon. 130. *Benfield v. Feek*, Gould. 149.

(3) 2 Inst. 607. *Worts v. Clyston*, Gibson's Codex, 1027. Cro. Jac. 350. 3 Burn's E. L. 400.

(4) *Dullingham v. Kyfeley*, Cro. Eliz. 251.

(5) *Roberts' case*, 2 Rol. Abr. Prohibition (A), 312. pl. 5.

(6) *Love v. Pigott*, Cro. Eliz. 55.

(7) *Ex parte Law*, 2 A. & E. 45. 2 Dowl. P. C. 528.

(8) *In re Ethelburrow (Parish of)*, March, 22.

(9) *Hill v. Bird*, Aleyn, 56.

(10) *Jefferson v. Durham (Bishop of)*, 1 B. & P. 105.

(11) *Green v. Pope*, 1 Id. Raym. 127. *Ann-Vent*, 265, 266. *Hinchcliffe v. Beaumont*, Raym. (Sir T.), 425. *Chicken v. Dickson*, Comb. 448. *Gibbons' case*, *ibid*.

(12) *Bartue's case*, Owen, 13.

If the defendant in a prohibition die, his executors may proceed in the Spiritual Court; and the judges of that court, out of which the prohibition was granted, will also in such case make a rule to the Spiritual Court to proceed; but the plaintiff may, if he please, have a new prohibition against the executors. (1)

PARTIES.

Executors.

6. WHEN A PROHIBITION WILL AND WILL NOT BE GRANTED.

WHEN A PROHIBITION WILL AND WILL NOT BE GRANTED.

The awarding of a prohibition is discretionary, that is, from the circumstances of the case, the superior courts are at liberty to exercise a legal discretion herein, but not an arbitrary one, in refusing prohibitions, where in such like cases they have been granted, or where by the laws and statutes of the realm they ought to be granted. (2)

Awarding a prohibition is a matter discretionary.

In all cases where inferior courts assume a jurisdiction, or hold plea of a matter not arising within their limits, the party can stay their proceedings by prohibition. (3)

Where inferior courts assume any improper jurisdiction.

An ecclesiastical citation will be bad, if it describe no ecclesiastical offence. In *Francis v. Steward* (4) the citation only stated, as the matter of charge, that the party cited, a parishioner of St. George of Colegate, in the diocese of Norwich, wilfully and contumaciously obstructed, or at least refused to make or join or concur in the making of a sufficient rate for providing funds to defray the expense of the necessary repairs of the parish church.

An ecclesiastical citation will be bad, if it describe no ecclesiastical offence.

The parishioner appeared to this citation under protest. The judge of the Ecclesiastical Court overruled the protest, and ordered the party to appear absolutely. He thereupon declared in prohibition, setting forth the citation and the other proceedings. On demurrer to the declaration it was held, that the declaration was good, the citation being insufficient to give jurisdiction; and that the suit in prohibition was not premature; Lord Denman observing, "This declaration in prohibition sets forth a citation from the Dean of the Arches, founded on letters of request from the Consistory Court of the Bishop of Norwich, in a suit against the plaintiff touching his soul's health, and for correction of his errors and excesses, 'particularly in respect of his having wilfully and contumaciously obstructed, or at least refused to make, or join or concur in the making, of a sufficient levy, rate, or assessment for providing funds in order to defray the expense of the necessary repairs of the parish church.' The declaration alleged that by the said citation the plaintiff was not charged with any ecclesiastical offence cognisable by any ecclesiastical court. A general demurrer to this declaration has been argued before us.

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"No question was made whether a citation must not contain the charge of an ecclesiastical offence. In the ancient constitutions a remedy is applied

(1) Watson's Clergyman's Law, 618.

(2) *Betts v. Hancock*, 1 Salk. 33. *Hitchin (Parish of)*, Comb. 148. *Breedon v. Gill*, 1 Ld. Raym. 220. *Jones v. Stone*, *ibid.* 578. *Smith v. Waller*, *ibid.* 586.

(3) *Sparks v. Wood*, 6 Mod. 146. *Anon.* 1 Salk. 201. *Anon.* 1 P. Wms. 476. *Gloucester (Bishop and Dean of)*, case of, Bull. N. P. 219. (b). *Smith v. Bradley*, *ibid.* (4) 5 Q. B. 984.

WHEN A PROHIBITION WILL AND WILL NOT BE GRANTED.

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to many abuses of process by citing persons out of the jurisdiction wherein they reside ; and finally the act of Henry 8. (1), commonly called the Bill of Citations, was passed to prevent this great and frequent oppression, whereby persons often found themselves excommunicated and ruined without notice of the proceedings against them. But it is constantly assumed that they set forth on the face of them a spiritual offence.

“Many such offences were well known by their proper descriptions: heresy, incontinence, brawling, subtraction of the various kinds of ecclesiastical dues, &c. It was not urged, that there can be no offence where the acts charged are incapable of technical designation, but that, if the offence consist of special circumstances, these should appear on the citation; not unlike the proceedings of our own courts, where writs were provided in common form for known causes of action, but an action on the case might be founded on special facts converting what might have been innocent in itself into an injury to the party complaining, and a writ was framed for the occasion.

“The solicitor general maintained, that the words of charge which I have just read from the citation impute a spiritual offence. Not denying the right of every parishioner to refuse to make, or join or concur in making, a church rate, nor even the right to vote against the imposition of a rate, he still urged that to do either ‘wilfully and contumaciously’ is a spiritual offence, and that the wilfulness and mode of refusing, and the accompanying acts inferring that contumacy which thus became the essence of it, need not be further particularised in the citation; but may be introduced for the first time to the knowledge of the accused as evidence in support of the charge. In the proceedings of any court where an accusation is preferred, the minimum of allegation is the maximum required in proof: the prosecutor in several counts (as the charges in the *præsertim* are called by learned ecclesiastical judges), must be entitled to succeed, if he establish any one of them; and consequently, if this citation is good, the present plaintiff will incur spiritual censures, though convicted of no other fact than that of a refusal to join in making a church rate.

The refusal to join in making a church rate is not an offence.

“We are by no means satisfied that the refusal to join in making a church rate can be an offence in a parishioner, because it cannot be necessary for all the parishioners to join in making it: a majority may do this act; and, if it is done, what offence can there be in refusing to concur in it? If a church rate is made, it can hardly be conceived that that default should be produced by the refusal of a single parishioner to concur in imposing one. If indeed he does any thing for the purpose of defeating the measure, if he is guilty of any violence or fraud, if he bribes or intimidates other men from voting for a rate, if he deceives parishioners as to the time or place of meeting, if he persuades others to absent themselves, or even (according to one supposition made at the bar) absents himself in order to prevent a regular assemblage, these may be criminal acts; but they are not the refusal of a church rate, nor evidence of such refusal; they are wholly independent of the mere refusal, and are capable of being distinctly stated.

“But, further, the sufficiency of this charge in its more cogent terms, that the plaintiff wilfully obstructed the making of a church rate, may

well be questioned. It might be the duty of a parishioner wilfully to obstruct it. A parish meeting being convened to consider of granting such rate (though even that is not stated in the present citation), the parishioners go to the meeting to take part in its deliberations, and exercise their judgment on the question raised, must they not exercise it with freedom? Are they bound to vote one way? On the contrary, the law permits them to object to the grant proposed; to argue that it ought not to be made; to vote for refusing it. Persons so acting may be truly said to wilfully obstruct the making of a rate; that phrase would be generally supposed to point at similar proceedings; yet they are all undoubtedly lawful. Each member of this deliberative assembly may be bound by every principle to take the part now supposed. Can he be treated as a criminal in any English court for the performance of this acknowledged duty?

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"There is an answer, indeed, to this and every other objection, which sweeps them all away. The acts of the plaintiff denounced in the citation are therein alleged to have been both wilfully and contumaciously done. Now the first of these two words adds nothing to the charge of refusing; all refusal is wilful. It may be doubtless a word of great force when connected with acts of obstruction; for these may be unconsciously done by a person ignorant of their tendency, and can never be criminal without the knowledge of it. Can then a wilful refusal, possibly an act of duty and perfectly innocent, be transmitted, by the mere addition of a reproachful term, into a crime? It conveys no idea to the hearer's mind but that the speaker disapproves or resents the conduct to which he applies it. He may perhaps deem that conduct in itself contumacious, or may consider it as deserving the epithet from other facts antecedent or contemporaneous. Can any thing be more easy than to describe these facts, or more dangerous than to treat another as a criminal without informing him how he is supposed to have become so? Our own forms of indictment and declaration have been constantly held defective, where the facts averred falling short of the legal definition, an attempt has been made to eke it out by adverbs either vituperative or commendatory. The Courts refuse to infer guilt from them on the one hand, or a due course of legal proceeding within lawful jurisdiction on the other. Nor is this strictness imposed by technical rules; it grows out of the first principles of justice.

All refusal is wilful.

"There are, however, certain authorities, the decisions of the spiritual courts themselves, which we are bound respectfully to consider and examine. They underwent a careful and minute discussion from the eminently learned person whose judgment is now questioned, in the course of delivering that judgment. He founded it on some of these authorities, and distinguished it from some others which were pressed as leading to the opposite conclusion.

"The case of *Greenwood v. Greaves* was formerly adjudged to be precisely in point. The report is in 4 Hagg. 77. Two of the churchwardens of Dewsbury cited the two other churchwardens and ten parishioners for refusing to make, or concur in making, a rate or assessment, or sufficient rate or assessment, for the repairs of the parish church, and for the lawful and necessary expense of the churchwardens relating to the parish church, and incidental to their said office. The material article set forth a regular vestry meeting to consider certain statements and estimates of the charges for the

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ensuing year, relative to the repair of the church, and providing bread and wine for the holy communion, and other incidental expenses, and to make a rate for defraying the same; that a rate or assessment was proposed according to a moderate estimate of the expenses which were lawful and necessary; notwithstanding which the parties cited 'objected to, and did refuse to make or concur in making a rate, to the amount necessary to defray the charges and expenses;' but voted for one wholly inadequate; and 'by reason thereof, the necessary and legal repairs cannot be done, nor other expenses necessary' for divine service 'be defrayed.' The Chancery Court at York rejected the articles, which on appeal were brought before the delegates, Bolland B., Bosanquet and Taunton Js., and Doctors Daubney, Haggard, and Curteis. This learned tribunal dismissed the appeal with costs. Their unanimous judgment is accompanied by no statement of their reasons. But some observations are reported which they interposed in the course of the unsuccessful argument. 'There is no precise allegation that the church is out of repair.' (1) If this were necessary, this single defect was fatal to the articles, and no other required notice. The Court also said to the counsel (2), 'The question here is as to two assessments; which sum shall be adopted.' 'If the Court were to say that the higher estimate shall be adopted, it will then decide on the quantum of rate; and your own case from 1st Modern (3) says, that 'the Court cannot assess the parishioners.' Here is a second deathblow to the articles, and the appeal was disposed of. But the delegates, or some or one of them, go a little farther, and indicate what the articles might have alleged, and what the Court might have thought of a state of facts which had no existence. 'If it had been alleged that the parishioners had contumaciously, obstinately, and pertinaciously refused to make a rate, or that they would only make such a rate as was manifestly collusive, there might be some ground for proceeding against them: but such a state of things is not alleged to exist in this case; there is no appearance of any wilful contumacy, either avowedly or impliedly.' (4) With unaffected deference to the learned judge, it might be doubted, but for his view of what fell from the Court, whether, instead of being a decision in point, these words amount to any decision at all. In the first place they are not applied to a citation but to articles; but, if they are to be considered as a form prepared by the judges, that form has not been pursued here. The words 'obstinately and pertinaciously' are by no means insignificant; they approach a great deal nearer to the precise ground of accusation than the very general complaint of contumacy. We apprehend that the judges meant only to say that words of that nature are indispensable, without entering upon the question, whether a pointed charge may not also be required. Whatever their inclination of opinion, it is expressed with no degree of confidence. 'There might be some ground for proceeding' falls infinitely short of a declaration that the form would be sufficient. Our brother judges who composed that court were not in the habit of deviating from their line of duty by obtruding on the world their opinions on a case not brought before them. They would not have been likely to draw up the form of a citation for future use; and no judge, however enlightened, knows how he would

(1) 4 Hagg. 82.

(2) Ibid.

(3) *Rogers v. Davenant*, 1 Mod. 194. 296.

(4) 4 Hagg. 82.

decide a novel point which he has not heard debated. The only authority, then, in support of the judgment which we are considering, appears to fail entirely.

WHEN A PROHIBITION WILL AND WILL NOT BE GRANTED.

“ But some authority is adduced against it — the authority of the same learned judge himself. In *Cooper v. Wickham* (1), a churchwarden was cited for having, at a vestry meeting for the purpose of a church rate, voted in favour of a resolution which declared church rates at all times bad in principle and unjust in practice, and quite uncalled for at the present time, and adjourned the meeting for twelve months; and for having voted against a church rate duly moved and seconded. The citation was not objected to; but the articles alleged that the roof of the church of Shepton Mallet ‘ was in so dilapidated a state, that the rain came through the same into the body of the said church to the serious detriment and injury of the fabric, and also of a valuable organ in the said church, and to the inconvenience of the officiating minister,’ ‘ who, on one occasion, on account of the rain so coming therein, was prevented from reading prayers in the reading desk, and of the congregation.’ The articles further charged that the meeting was called for imposing a church rate, and the party voted for the resolution above mentioned, and also presided at a division where it was carried by a majority.

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“ The learned judge held these articles insufficient. He considered them as equivalent to a charge of refusing not only the rate proposed, but any rate whatever; but he then expressly denied, that the refusal of any rate by a churchwarden was an ecclesiastical offence, observing that the Court is not to presume or conjecture any thing in a criminal proceeding. He did not enter upon the inquiry, whether the churchwardens, acting in avowed furtherance of his opinion that church rates were always ‘ bad in principle and particularly unjust in practice,’ were evidence of contumacy in the refusal, thinking the articles deficient herein, that they did not show that the dilapidated and unroofed church continued out of repair at the time of preferring the articles. He also remarks that it was not criminal, but might be highly proper, to consider in vestry the necessity for the repairs and the estimate of expense, which possibly may have been thought too high by the parishioners. This decision was not unreasonably pressed on Sir H. Jenner Fust, when the present citation was impugned before him. But in Dr. Curteis’s report the argument at the bar is briefly summed up, while the judgment of the Court occupies a very large space.

The refusal of any rate by a churchwarden is not an ecclesiastical offence.

“ After careful examination of these two cases, it is hard to discover any ground for excuse in that former case, which is not in the present. Mr. Cooper was charged with refusing to join in making any church rate; Mr. Francis with refusing to join in a particular rate; the latter being a parishioner only, the former both parishioner and churchwarden. Mr. Cooper was held guiltless, because the continuance of the dilapidation was not alleged; nor is it alleged against Mr. Francis. In Mr. Cooper’s case the Court could not conjecture or presume that the church may not have been completely restored between the citation and the articles. Is that conjecture or presumption to be made between the vestry meeting and the citation? Mr. Cooper was excused for refusing to join in making any rate,

(1) 2 Curt. 303.

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on the declared ground that church rates are always bad in principle, from a suggestion that the rate thus proposed might possibly have been thought by him higher than a fair estimate of necessary expense demanded. 'I do not know,' says the learned judge, 'that it is an offence in a churchwarden to vote against a rate of 2d. in the pound, unless it be shown, that it was adequate and only adequate, and not excessive, beyond the purpose for which it was intended to be applied.' (1) Such a vote would appear still less objectionable in a parishioner who holds no office. If the argument of counsel had been as fully reported as the judgment, we might have there found a complete demonstration that Mr. Francis was entitled to the benefit of this consideration, and that it would have shown the absence of all offence.

"The citation is not in respect of a refusal to join in making any rate, but the refusal to join in making a sufficient rate for necessary repairs. The refusal to make a sufficient rate raises a direct implication that Mr. Francis was willing to join in making some rate, and that his refusal to join in one which the accuser calls sufficient, might proceed from his perfect knowledge that it was much more than sufficient, and excessive beyond its legitimate purpose.

"This appears to be the natural meaning of the citation; and, if so, it virtually calls on the Ecclesiastical Court to do what it has uniformly disclaimed the power to do, determine on the amount of assessment to be imposed. The epithets *sufficient* and *necessary* have possibly by some inadvertence changed places; but, however placed, the word *sufficient* imports that there is no offence until, on inquiry, the Court has satisfied itself that the proposed amount was not more than necessary for the sufficient reparation of the church, and that the parishioner voted against the amount proposed from some improper motive, and in violation of his real opinion. The learned judge himself observes (2), that, if the charge had been 'for having wilfully and contumaciously obstructed,' and that had been the specific offence, he 'should have thought that the charge had not been sufficiently made out;' but he adds, 'there is a second count, for contumaciously refusing,' &c.

"There may be some difficulty in reconciling this sentence with some language in the preceding paragraphs, or with the two modes of charge in the præsertim, or to understand how *obstructing* can be less an offence than *refusing*, each act being supposed wilful and contumacious.

"But here attention must be drawn to the citation as it appears in these pleadings. (His lordship here read from the citation the words describing the alleged offence.) According to the strict rules of criticism, at least of legal criticism, as applied to instruments which ought to show criminal jurisdiction, the words 'wilfully and contumaciously' would appear to be confined to the obstruction, and by no means necessarily connected with the refusal. But if they were, we must examine the force of the word 'contumaciously.' To an argument at the bar that there can be no contumacy without a monition, a previous monition — monitione præmissâ — the learned judge gives this answer. 'It is said that a person cannot be contumacious unless there has been a monition issued against him, which has

(1) *Steward v. Francis*, 3 Curt. 223.

(2) P. 227.

Force of the word "contumaciously."

been disobeyed ; and, perhaps, that is correctly argued — what then ? The words ‘contumaciously obstructing’ import ‘that there has been a monition ;’ for if contumacy consist in disobeying a legal order, it follows, from the use of the word ‘contumacy,’ that there has been such an order.’ (1) If the whole train of circumstances necessary to make out an offence must be inferred from the use of a word which would be inapplicable unless those circumstances existed, the art of criminal pleading in all our courts will be reduced within very narrow limits indeed. ‘I have also been told,’ the learned judge continues (2), ‘that a party should be excommunicated, that being the extent to which the Court can proceed, in order to compel a parishioner to provide the necessary means for repairing the church ; and that this cannot be done, sine monition. Be it so ; if no monition has issued, then the Court will not proceed (if that is the law) to excommunicate the party. But it is possible, that a monition may have issued, and then the party may be liable to be excommunicated ; or if there has been no preceding monition, then the party may have a monition issued against him, in the course of these proceedings.’ (3) If it is here meant that a charge of contumacy in the citation may be established by proof of acting inconsistently with ‘a monition issued afterwards, we can neither assent to such a proposition, nor easily believe that it emanated from the learned judge. It seems much more probably a misconception in the reporter, or an erratum of the printer.

“Upon the whole, we think ourselves bound to pronounce the citation bad, as describing no spiritual offence. And we think it much better for the party to apply for prohibition in the first stage than after expense incurred.”

The superior courts of Westminster not only grant prohibitions where inferior courts assume a jurisdiction, which properly belongs to such superior courts, but also in cases where one inferior court encroaches upon another, and that even in matters in which such superior courts have not a jurisdiction (4):—thus, if the Ecclesiastical Court grant the probate of a will made within a manor, when by custom or of right such probate belongs to the lord of the manor, a prohibition will be granted. So where the marches of Wales held a plea of a matter that belonged to the court christian, the writ was issued (5); and in London, where the lord mayor and court of aldermen have the government of city orphans, if any orphan sue in the Ecclesiastical Court or elsewhere, for a legacy or duty due to them by custom, a prohibition lies. (6)

If a bishopric be void, and the jurisdiction devolve on the metropolitan, he must hold the courts within the inferior dioceses, otherwise he will be prohibited. (7)

If it appear on the face of the proceedings, in the Ecclesiastical Court, that they are about to exceed their jurisdiction, and try matters which are triable only at common law, the court of common law will grant immediate

WHEN A PROHIBITION WILL AND WILL NOT BE GRANTED.

Judgment of Lord Denman in *Francis v. Steward*.

Improper grant of probate.

Courts exercising jurisdiction in matters belonging to the court christian.

Suing in Ecclesiastical Court for a legacy or duty due by custom.

Inferior Ecclesiastical Courts.

Where it appears on the face of the proceedings, that

(1) 3 Curt. 226.

(2) Ibid. 227.

(3) Ibid.

(4) *Richmond's (Archdeacon of) case*, Lit.

45. *Compny de Horners in London*, 2 Rol. 471.

(5) 2 Rol. Abr. *Prohibition* (C), 313. pl. 3. *Good v. Good*, Winch, 78.

(6) 4 Inst. 243.

(7) *Pickaver's case*, Hob. 178.

WHEN A PROHIBITION WILL AND WILL NOT BE GRANTED.

the Ecclesiastical Court is about to try matters which are triable only at common law.

Determining the construction of an act of parliament, otherwise than the common law requires.

IF THE POWER OF THE ECCLESIASTICAL COURT BE DERIVED FROM A STATUTE, THE EXERCISE OF IT IS STRICTLY LIMITED.

Marriages not sanctioned by stat. 32 Hen. 8. c. 38.

prohibition, and not wait till the parties have incurred the expense of further proceedings. (1)

Where the Spiritual Court incidentally determines any matter of common law cognisance, such as the construction of an act of parliament, otherwise than the common law requires, prohibition lies after sentence, although the objection does not appear on the face of the libel, but is collected from the whole of the proceedings below. (2)

Dr. Gibson states (3), that "in some of the books there is an intimation, that not only all statutes whatever are to be interpreted by the temporal courts, but also that when a statute is made, giving remedy in a matter of ecclesiastical cognisance, the very making of such statute doth *ipso facto* take the right of jurisdiction from the Spiritual Court, and transfer it to the temporal, if there be not a special saving in the act to preserve the spiritual jurisdiction. But to this the rule laid down by Lord Coke (which is also generally followed by the books) is a full answer: — 'An act of parliament being in the affirmative doth not abrogate or take away the jurisdiction ecclesiastical, unless words in the negative be added, as, and not otherwise, or, in no other manner or form, or to the like effect.'"

In *Gould v. Gapper* (4) Lord Ellenborough held that the misconstruction of an act of parliament by the Ecclesiastical Courts in the decision of a case within their jurisdiction, is matter of prohibition, and not of appeal. It seems also to be established, that the writ will not be granted before the decision of the ecclesiastical judge has been actually given, as the temporal courts will not presume that it will be an erroneous construction of the statute; nor will they presume that the spiritual judge will exceed his jurisdiction. (5)

Where the power of the Ecclesiastical Court is derived from a statute, the exercise of it is strictly limited. Thus, upon the requisition by stat. 21 Hen. 8. c. 5. s. 4. that the executor shall "make a true and perfect inventory, and deliver it into the keeping of the ordinary;" it has been held, that the bishop's office is merely ministerial, that he cannot hear objections to the inventory, for had the statute meant to invest him with larger power, it would have said so in direct words. (6) But where a party cited as a resident within the ecclesiastical jurisdiction had appeared and pleaded without objection, he was not allowed afterwards to put the fact in issue, nor in such a case was an intervener allowed to raise an objection on this ground to the jurisdiction. (7)

If Ecclesiastical Courts molest or call in question marriages not sanctioned by stat. 32 Hen. 8. c. 38. (which prohibits marriages within the Levitical degrees), a prohibition lies; because they act contrary to that which is declared to be lawful by statute. But, where they are not bounded by any law, their jurisdiction still continues, and therefore, within the Levitical degrees, they are still judges of incest. (8)

(1) *Byerley v. Windus*, 5 B. & C. 21. *French (Clerk) v. Trask*, 10 East, 350. *Darby v. Cosens (Clerk)*, 1 T. R. 552. *Roberts v. Humby*, 3 M. & W. 120. 6 Dowl. P. C. 82. *Seem*, that the Court will also grant the writ, though the want of jurisdiction does not so appear, when the party has had no opportunity of applying earlier to the superior court, and has not acquiesced in the proceedings.

(2) *Gould v. Gapper (Clerk)*, 5 East, 345.

(3) Gibson's Codex, 1028.

(4) 5 East, 345.

(5) Vide *Blacket v. Blizzard*, 9 B. & C. 851. *Ex parte Law*, 2 A. & E. 45. *Hall v. Maule*, 7 ibid. 721. *Blunt v. Harwood*, 8 ibid. 610.

(6) *Griffiths v. Antony*, 5 A. & E. 623.

(7) *Chichester v. Donegal*, 6 Madd. 375.

(8) *Man's case*, 4 Leon. 16. *Harrison v.*

If it be made a question in the Ecclesiastical Court, whether the words of the statute 25 Hen. 8. c. 22. have given sufficient power to the archbishop to grant marriage licences, and they determine against the power, a prohibition lies; for by this they determine against an act of parliament, which is a temporal affair: but, if they allow the power, they may determine as to the form of the licence, the notice, and other circumstances requisite, &c.; for in these they have a jurisdiction, as such licences have been, and still are, notwithstanding this statute, of ecclesiastical cognisance. (1)

WHEN A PROHIBITION WILL AND WILL NOT BE GRANTED.

Marriage licences.

In *Wheeler's case* (2), who was presented in the Ecclesiastical Court for working upon holydays, viz. carrying hay on St. John Baptist's Day in church time, a prohibition was granted, because this was excepted by stat. 5 & 6 Edw. 6. c. 3., it being a work of necessity; and this being a holyday by act of parliament, it belongs to the judges of the common law to determine whether it was broken or not.

Working upon holydays.

But on a motion for a prohibition to the Ecclesiastical Court, to stay a suit against a person for brawling in the belfry, and striking a man there, the statute of 5 & 6 Edw. 6. c. 4. was suggested; and it was alleged, that all statutes are construable by the common law, and that the person striking was mayor of the town, and that he came there to suppress a riot: but the prohibition was denied, because this offence was conusable in the Ecclesiastical Court before this statute *ratione loci*; and the statute, though it provides a penalty, does not alter the jurisdiction. (3)

Brawling.

If there be a controversy, whether a person has disposed of the guardianship of his child pursuant to stat. 12 Car. 2. c. 24., or whether he has revoked such disposition, this cannot be determined in the Ecclesiastical Courts. (4)

Guardianship of child.

Where an administration was granted to the next of blood, and upon this an appeal was sued to the delegates, who revoked the sentence, and granted it to another, who was not nearer of blood by our law, but was so by the ecclesiastical law, it was held that a prohibition lay; because this being ordained by statute, ought to be interpreted accordingly. (5)

Grant of administration to the next of blood.

Matters of freehold and the rights of inheritances, are only determinable in the temporal courts; and if the ecclesiastical courts intermeddle with such rights a prohibition lies. (6)

ECCLESIASTICAL COURTS CANNOT DECIDE QUESTIONS OF FREEHOLD, AND THE RIGHTS OF INHERITANCE.

Trespass on a glebe being freehold cannot be determined in the Ecclesiastical Court. (7)

Thus, a parson cannot libel another in the Ecclesiastical Court for cutting elms in the churchyard, because the churchyard is his freehold. (8)

Cutting trees in the churchyard.

A prohibition was granted to a suit in the Spiritual Court for breaking a church wall, and cutting down the boughs of a tree in a churchyard, for the rector having the freehold has a right to bring his action, whereby the party would be subjected to a double prosecution. Besides, the ordinary

Breaking a church wall.

Burwell (D.D.), Vaugh. 206. 2 Inst. 614. 618. *Juron* (Sir W.) v. *Byron* (Lord), 2 Lev. 64. *Gould* v. *Gapper* (Clerk), 5 East, 345. 3 ibid. 472.

(1) *Matingley* v. *Martyn*, Jones (Sir W.), 259, 260.

(2) Godb. 218.

(3) *Wenmouth* v. *Collins*, 2 Ld. Raym. 850. *Ex parte Williams*, 4 B. & C. 313.

(4) *Chester's* (Lady) case, 1 Vent. 207. 3 Keb. 30.

(5) 2 Rol. Abr. *Prohibition* (Q), 303. pl. 27.

(6) F. N. B. 40. 2 Rol. Abr. *Prohibition* (F), 287. *Pomfraye's case*, Lit. 164.

(7) Bro. *Jurisdiction*, pl. 41

(8) *Hilliard* v. *Jeffreson*, 1 Ld. Raym. 12.

WHEN A PROHIBITION WILL, AND WILL NOT BE GRANTED.

Feoffment of tithes.

Legatees suing in Ecclesiastical Court for their shares under a will.

Rent devised out of a farm for years.

THE RIGHTS OF OFFICES FOR LIFE.

Prohibition lies to a bishop to prevent him from presenting to a freehold office.

In cases of prescription, the matter is solely determinable at common law.

cannot punish a trespass committed on the body of the church, unless it hinder divine service. (1)

Where in a feoffment of tithes and lands where there was no livery, the Spiritual Court adjudged that the tithes should pass, it was held, that a prohibition lay. (2)

If a man devise that his lands shall be sold for the payment of his debts, and that the overplus shall be paid to such and such persons in certain shares, the legatees in this case cannot sue in the Ecclesiastical Court; for the provisions intended therein arise originally out of lands, and their proper remedy is in a court of equity. (3)

But if a rent be devised out of a farm for years, the Ecclesiastical Courts may hold plea thereof; for the term for years being only a chattel is testamentary, and consequently the rent devised thereout. (4) Where the legacy was to arise as well out of a term for years as out of lands of inheritance, and the executor received it, but having died without payment, so that no action of account could be brought at common law against his executor, it was held that the Ecclesiastical Court had cognisance thereof. (5)

The rights of offices for life in the Ecclesiastical or Court of Admiralty, are determinable at common law; thus, where the question was concerning the validity of two patents, by which the office of a registrar to a bishop was granted, it was held, that this could not be tried in the Spiritual Court, though the subject matter be spiritual; because the office itself being matter of freehold, is, for that reason, of temporal cognisance. (6)

A prohibition was granted to the Bishop of Chichester to prohibit him from proceeding to present by lapse, under pretence of visitatorial authority, to the office of canon residentiary of the cathedral, it being a freehold office, and the right of election being in the dean and chapter. (7)

The ecclesiastical jurisdiction does not extend to the trial of customs, or prescriptions; and, consequently, in all cases of prescriptions, such as for church seats, the matter is solely determinable at common law. (8)

And, therefore, where W. was sued for disturbing a person in his seat in the church, it was suggested for a prohibition, that he purchased an ancient house with this seat belonging to it, to him and his heirs, which was pleaded below. But the Court observed, "This is enough to show the temporal right is in question," and a prohibition was awarded. (9)

In *Market Bosworth (Churchwardens of) v. Market Bosworth (Rector of)* (10), the churchwardens libelled against the rector, that there had been, from time out of mind, a chapel of ease within their parish; and that the

(1) *Binsted v. Collins*, Bunb. 229.

(2) *Roberts' case*, Cro. Jac. 270. *Bate's case*, 1 Vent. 41.

(3) *Dyer*, 151. (b), pl. 5.; 264. (b), pl. 41. *Edwards v. Graves*, Hob. 265. 2 Rol. Abr. *Prohibition* (F), 284, 285. pl. 28. 32. *Bastard v. Stockwell*, 2 Show. 50. *Green's case*, Cro. Car. 16.

(4) *Rumsey v. Ross*, 1 Sid. 179. S. C. nom. *Rumney or Rourney v. Rosse*, 2 Keb. 5. *Shppard v. Penrose*, 1 Lev. 179.

(5) Action of account is given against executors by stat. 4 Anne, c. 16. s. 27. *Lore v. Naplesden*, Cro. Jac. 279.

(6) 2 Rol. Abr. *Prohibition* (F), 285.

pl. 45. *Sutton's (Dr.) case*, Noy, 91. *Latch*, 228. *Glanvil's case*, Palm. 450. *Sutton's (Chancellor of Gloucester) case*, Godh. 390. Cro. Car. 65. *Barker (Dr.) v. L'Evesque de Oxon*, 2 Rol. 305. *Sharrock v. Bouchier*, Raym. (Sir T.), 88. 1 Lev. 125. *Jones v. Beau*, 4 Mod. 27. *Jones v. St. Asaph (Bishop of)*, Comb. 305.

(7) *Chichester (Bishop of) v. Harward*, 1 T. R. 650.

(8) *Degge's P. C.* by Ellis, 214. *Watson's Clergyman's Law*, 388, 389. *Rhodes v. Oliver*, 2 H. & W. 38. *Vide tit. Pews*.

(9) *Witcher v. Chesham*, 1 Wils. 17.

(10) 1 Ld. Raym. 435.

rector had always repaired and was bound to repair the chancel; and that, although the chancel was then out of repair, it was not repaired by the rector. The rector having denied the custom, a decree was made for him that there was no such custom, and his costs were taxed. The churchwardens moved for a prohibition, because it appeared that the libel was upon a custom which the defendant had denied, and that the question might have been in the Spiritual Court, custom or not, which was not triable there, but at the common law; that this appearing upon the libel, the Court had not jurisdiction, and therefore that prohibition might be granted after sentence. To which Chief Justice Holt observed, "The reason for which the Spiritual Court ought not to try customs is, because they have different notions of customs, as to the time which creates them, from those that the common law hath: for in some cases the usage of ten years, in some twenty, in some thirty years, make a custom in the Spiritual Court; whereas, by the common law, it must be for time immemorial. And therefore, since there is so much difference between the laws, the common law will not permit that court to adjudge upon customs, by which in many cases the inheritances of persons may be bound. But in this case, that reason fails; for the Spiritual Court is so far from adjudging that there is any such custom which the common law allows, that they have adjudged that there has not been any custom, allowed by their law, which allows a less time than the common law to make a custom. And the plaintiffs having grounded their libel upon a custom, which was well grounded, if the custom had not been denied (for libels there may be upon customs); but the custom being denied and found no custom, it is not reason to prohibit the Court in executing their sentence against the plaintiffs. For the design of a motion for a prohibition, is only to excuse the plaintiffs from costs; and there is no reason, but that they ought to pay them, since it appears that they have vexed the defendant without cause;" and, therefore, a prohibition was denied.

It has been held, that if a modus or prescription be set up by the plaintiff, or pleaded by the defendant (1), or if it appeared in his answer to the Spiritual Court, a prohibition lay; but a prohibition will not be granted to stay proceedings where a modus or prescription is pleaded; or (2) to stay a suit for a mortuary, unless the custom has been denied in the Spiritual Court. (3)

It appeared in *Jones v. Stone* (4) that the plaintiff, the vicar of N., was sued against in the Spiritual Court, for that by custom time out of mind, the vicars of N. had, by themselves or others, said and performed divine service in the chapel of Chawbury, for which there was a recompense, and that he neglected his duties. The defendant applied for a prohibition, and without traversing this custom, suggested that all customs were triable at common law. And it was urged, that it was enough for a prohibition, that a custom appeared to charge the vicar with a duty, for which he was not liable of common right. But by Chief Justice Holt: "A parson may be bound to an ecclesiastical duty by custom, and when he is bound by custom, the Spiritual Court may punish him if he neglect that duty; the custom might have a

WHEN A PROHIBITION WILL AND WILL NOT BE GRANTED.

Judgment of Chief Justice Holt in *Market Bosworth (Churchwardens of) v. Market Bosworth (Rector of)*.

Where a custom or prescription is admitted by the pleadings.

Modus.

Mortuary.

A person may be bound to an ecclesiastical duty by custom.

(1) *Burdeux v. Lancaster (Dr.)*, 1 Salk. 633. *French (Clerk) v. Trask*, 10 East, 348. (2) *Anon.*, 2 Salk. 551. Winch, 33. (3) *Johnson v. Oldham*, 1 Ld. Raym. 609. *Johnson v. Rysom*, 12 Mod. 416. (4) 3 Salk. 550. 1 Ld. Raym. 578.

WHEN A PROHIBITION WILL AND WILL NOT BE GRANTED.

When the subject of the suit is within the jurisdiction of the Spiritual Court, a mere suggestion of a custom is no ground for a prohibition. Boundaries of parishes cannot be tried by the Ecclesiastical Court.

Whether a church be parochial or a chapel of ease.

Where tithes alleged to be in a different parish from that in which they are claimed.

Suit between rector and vicar respecting tithes.

Bounds of two villis lying in the same parish.

reasonable commencement by composition in the Spiritual Court, and begin by an ecclesiastical act; and a bare prescription only is not a sufficient ground for a prohibition, unless it concerns a layman; whereas here it is an ecclesiastical right, an ecclesiastical person, and an ecclesiastical duty, and the prescription not denied."

If the subject of the suit be within the jurisdiction of the Spiritual Court, the mere suggestion of a custom in the pleadings there, if they do not go to try it, will be no ground for a prohibition. (1) But if the Ecclesiastical Courts take upon them to determine it, a prohibition will lie. (2)

The bounds of parishes, though coming in question in a spiritual matter, can only be tried in the temporal courts. This is a maxim in which all the books of common law are unanimous, though our provincial constitutions expressly mention *limites parochiarum*, among the matters *quæ merè ad forum ecclesiasticum pertinere noscuntur*, and, *quæ non possunt ad seculare forum aliquatenus pertinere*, complaining of this, as one encroachment, among others, which the temporal courts were making upon the spiritual at that time. (3)

If the question be in the court christian, whether a church be a parochial church, or but a chapel of ease, a prohibition lies. (4)

If the vicar of a parish libel against another to avoid his institution to the church of D., which he supposes to be a chapel of ease appertaining to his vicarage, and the defendant suggest that D. is a parish of itself, and not a chapel of ease, a prohibition will be granted, for they cannot try the bounds of the parish. (5)

But Dr. Gibson says, that a chapel or no chapel ought to be tried by the spiritual judge; for when two spiritual things are to be tried, no prohibition shall be granted. (6)

Where a suit was instituted in the Ecclesiastical Courts by a parson for tithes, and the defendant pleaded that the place for which the tithes was sued was in another parish, a prohibition was issued, because the Court meddled with that which was out of their jurisdiction, though the original thing be of their cognisance, and thus interfered obliquely. (7)

If the suit be between a rector and vicar, though the former be an impropriator, it must be tried in the Spiritual Court, and no prohibition will lie. If it be a proceeding to determine a case of tithes, the right to which depends on the lands lying in a vill within the parish, or in the other part of the parish, the question is triable in the Ecclesiastical Court. (8)

If the bounds of two villis lying in the same parish come in question in the Spiritual Court, no prohibition lies; because such bounds are triable in the Ecclesiastical Court, though those of parishes are not. (9)

(1) *Dutens (Clerk) v. Robson*, 1 Hen. Black. 100. *Byrley v. Windus*, 5 B. & C. 21.

(2) 2 Inst. 653. *Anon. Latch*, 48. *Benniff v. Pepple*, 2 Lev. 63. *Elkin v. Wastell*, 3 Bulst. 231. *Goslin v. Harden*, 1 Rol. 419. *Leresque de Winchester's case*, 2 Co. 45.

(3) Gibson's Codex, 212.

(4) 2 Rol. Abr. *Prohibition* (F), 291. pl. 3. Gibson's Codex, 213.

(5) 2 Rol. Abr. *Prohibition* (F), 291. pl. 2.

(6) Gibson's Codex, 210. *Kenne's case*, 7 Co. 44. *Foster v. Hyde*, 1 Rol. 332. *Stran-*

sham v. Cullington, Cro. Eliz. 228. 3 Leon. 129. *Brown v. Pulfray*, 3 Keb. 286.

(7) 2 Rol. Abr. *Prohibition* (E), 282. pl. 3. *Randall v. Knowles*, Noy, 147. *Anon.* 1 Vent. 335. *Strong v. —*, Bulst. 159. *Copley's case*, Hardr. 406. *Britton v. Standish*, 1 Salk. 166. 6 Mod. 188.

(8) 2 Rol. Abr. *Prohibition* (A), 312. pl. 3, 4, 5.

(9) *Pettler v. Yuleman*, 1 Lev. 78. *Butler v. Yuleman*, 1 Sid. 89. 2 Rol. Abr. *Prohibition* (A), 312. pl. 7.; *sed vide* Gibson's Codex, 213.

In the case of *St. George, Hanover Square*, it was said, that the Ecclesiastical Court cannot compel the rector and parishioners to concur in a licence to be granted for the erection of a charity school on part of the churchyard; and that a prohibition was granted. (1)

And where a defendant was proceeded against in the Spiritual Court for a nuisance and encroachment, and pleaded that the buildings complained of stood upon the old site of former tenements belonging to him, and did not project further, a prohibition was likewise granted; for though interrupting the use of a churchyard is properly cognisable in the Ecclesiastical Court, yet the bounds of it, which is matter of freehold, ought not to be determined there. (2)

The Ecclesiastical Courts have cognisance of a way to a church, and for not repairing such way the parties may be proceeded against in the Spiritual Court. (3)

And where a parson was prevented from carrying away his tithe by the stopping up the usual way, it was held that he might have his remedy in the Ecclesiastical Court under stat. 2 & 3 Edw. 6. c. 13. (4)

But if the question be, whether he is to have one way or another, or whether such a way be a highway or not (5), that question cannot be tried in the Spiritual Court.

If the churchwardens of a church sue for a way to the church, which they claim to appertain to all the parishioners by prescription, a prohibition will be granted; for this right being grounded on the prescription, is to be tried in the temporal courts. (6)

If a person have a good title to an aisle, and the ordinary place another person therein with the proprietor, the proprietor may have his action upon the case against the ordinary; and if he be impleaded in the Spiritual Court for the same, a prohibition will lie; or if any private person sit therein, or keep out him that has the right, or bury his dead there without his consent, the proprietor can maintain an action upon the case. (7)

But no such title can be good, either upon prescription, or upon any new grant, by a faculty from the ordinary, to a man and his heirs, but the aisle must always be supposed to be held in respect of the house, and will always go with the house to him that inhabits it. (8)

The Spiritual Court may proceed for a disturbance of a seat upon libels grounded on prescription, where the prescription is not denied, as in cases for a modus or a pension by prescription. (9)

In *Langley v. Chute* (Sir T.) (10), a prohibition was refused to a libel for the sole use of a pew, to which the churchwardens would have appointed another person than the person appointed by the ordinary, because the ordinary has jurisdiction, and the churchwardens cannot oust his authority, when the privilege is claimed only for the defendant and his family; and

WHEN A PROHIBITION WILL BE GRANTED.

Ecclesiastical Court cannot compel rector and parishioners to give up part of their churchyard.

Where the boundaries of a churchyard are disputed.

Right of church-way.

Churchwardens cannot sue for a church-way.

Intrusion upon aisles.

Disturbance of church seats.

(1) *Steer's P.L.* by Clive, 49.

(2) *Pew v. Cresswell*, 2 Str. 1013.]

(3) *Barchley v. Crooke*, March, 45.

(4) *Anon.* 1 Bulst. 67. *Halsey v. Halsey*, Jones (Sir W.), 230.

(5) *Anon.* March, 45. 1 Bulst. 67. 2 Rol. Abr. *Prohibition* (F), 287. pl. 48. S.P. adjudged.

(6) *Hill v. Bedoe*, 2 Rol. 41.

(7) *Watson's Clergyman's Law*, 388, 389.

(8) *Hussey v. Leyton*, 12 Co. 106. *Crook v. Samson*, 2 Keb. 92. *May v. Gilbert*, 2 Bulst. 150. *Barrow v. Kaen*, 1 Sid. 361.

(9) *Jacob v. Dallow*, 2 Salk. 551. 1 Ld. Raym. 755.

(10) *Raym.* (Sir T.), 246.

WHEN A PROHIBITION WILL AND WILL NOT BE GRANTED.

Repairing church seats.

Ordering seats exclusive of the ordinary.

5

The Spiritual Court cannot try the existence of a vicarage.

Suit in the Ecclesiastical Court to avoid institution; or questioning the right to the incumbency.

Bishops cannot decide upon the right of election for a lecturer.

if the plaintiff be grieved by the sentence, he may appeal; for the common law court can determine a point on the canon law, if the party have an appeal. (1)

If a person be sued in the Ecclesiastical Court for a seat in the church, and be desirous to obtain a prohibition, and oust the ordinary of jurisdiction, he must show such a legal title as cannot be tried in the Ecclesiastical Court, which can only be by prescription, and prescription can in such case be no otherwise proved than by showing repairs; therefore, in a declaration in prohibition, the plaintiff regularly ought to set out a custom of repairing; but if he do not, and if the defendant do not demur, but go to trial, it will be aided by the verdict, for the plaintiff ought not to have a verdict, unless he proves a custom to repair. (2)

A custom, time out of mind, of disposing of seats by the churchwardens and major part of the parish, or by twelve or any particular number of the parishioners, is a good custom, and if the ordinary interpose, a prohibition will be granted. (3)

But the churchwardens must show some particular reason why they are to order the seats exclusive of the ordinary; for a general allegation, that the parishioners have used to build and repair the seats, and that by reason thereof, the churchwardens have used to order and dispose of them, is not sufficient to take away the ordinary's power herein. (4)

It was held in *Smith v. Wallet* (5), that a Spiritual Court cannot try the existence of a vicarage.

If a man be admitted, instituted, and inducted, and a suit be commenced in the Ecclesiastical Court to avoid the institution, supposing it not valid; though the thing be of their cognisance, yet, because the induction, which is temporal, and gives a lay right, may depend upon it, a prohibition lies. (6)

If there be a suit for tithes in the Ecclesiastical Court, and the tenant plead, that the party who sues is not incumbent, but that I. S. is, and this plea, because it goes to the right of the incumbency, be rejected, a prohibition lies; for, by denying the tenant this liberty, he might be twice charged for his tithes. (7)

Respecting lecturers, the bishop's power is generally only to judge as to the qualification and fitness of the person, and not as to the right of the lectureship. And, therefore, where the Bishop of London determined in favour of one of two rival candidates, and granted an inhibition and monition accordingly, Chief Justice Holt said, "A prohibition must go to try the right; it is true a man cannot be a lecturer without a licence from the bishop or archbishop, but their power is only as to the qualification and fitness of the person, and not as to the right of the lectureship; and the Ecclesiastical Court may punish the churchwardens, if they will not open the church to the person, or to any one acting under him, but not if they refuse to open it to any other." (8)

(1) *May v. Gilbert*, 2 Bulst. 151.

(2) *Stedman v. Hay*, Com. 368.

(3) Gibson's Codex, 198.

(4) Watson's Clergyman's Law, 389. *Presgrave v. Shrewsbury* (Churchwardens of), 1 Salk. 167. Vide Gibson's Codex, 198. *Brabin v. Trediman*, 2 Rol. 24.

(5) 1 Ld. Raym. 587.

(6) *Hutton's case*, Hob. 15. *Oliver v.*

Hussey, Latch, 205. *Holt's case*, 1 Bulst. 179. *Stevens v. Cripps*, Lit. 165. *Rone's case*, Poph. 133. 2 Rol. Abr. *Prohibition* (1), 282. *Clerk (Sir R.) v. Andrews*, 1 Show. 10.

(7) *Green v. Penilden*, Cro. Eliz. 228. *Pendleton v. Green*, 3 Leon. 265.

(8) *St. Bartholomew's (Churchwardens of) case*, 3 Salk. 87.

By canon 91., "no parish clerk, upon any vacation, shall be chosen within the city of London, or elsewhere, within the province of Canterbury, but by the parson or vicar; or, where there is no parson or vicar by the minister of that place for the time being;" but a prescriptive right to the office of parish clerk will be preferred before the canon; because the party chosen is a mere temporal man, and the custom is merely temporal, so as the official cannot deprive him; but upon occasion, the parishioners might displace him. (1)

WHEN A PROHIBITION WILL AND WILL NOT BE GRANTED.

Canon 91.
Election of parish clerks.
Custom preferred to canon law.

So in *Jermyn's case* (2), where the rector and clerk sued in the Spiritual Court to have the clerk established, having been nominated according to the canon, but disturbed by the parishioners; and the churchwardens and parishioners prayed a prohibition, upon the surmise of a custom for the vestry to elect; after divers motions a prohibition was granted: for they held that it was a good custom, and that the canon cannot take it away. (3) Notwithstanding he was admitted without deed. (4)

A prohibition lies for trying the right of naming a churchwarden in the court christian, because churchwardens are considered as temporal officers by various acts of parliament. (5)

Election of churchwardens.

But although the Ecclesiastical Court has no jurisdiction to examine churchwardens' accounts, it has power to compel them to deliver them in. (6)

Ecclesiastical Court can compel churchwardens to deliver in their accounts, but has no jurisdiction to examine them.

If the churchwardens take away the bells of a church, they may be proceeded against in the Ecclesiastical Courts for such sacrilegious taking (7); although an action lies against them at common law by their successors; and the remedy in this case is said to be most proper in the Spiritual Court, because at common law damages only are recovered, but in the Ecclesiastical Court they decree a restitution of the thing in specie. (8)

Churchwardens improperly taking away the church goods.

The legality of a select vestry may, it seems, be tried incidentally to the principal matter of a suit in the Ecclesiastical Courts. Thus, in questions of subtraction of church rate, the Court having jurisdiction on the subject matter, is bound, unless stopped by prohibition, to proceed to the trial of a select vestry, by which the rate was made, and it must be a prohibition in the particular suit; for if other parties before the Court upon the same question have been stopped by prohibition, this will not authorise the refusal of the Court to proceed with the cause. (9)

Legality of a select vestry may be tried incidentally to the principal matter of a suit in the Ecclesiastical Courts.

If a rate be made by the churchwardens, after the majority of the parishioners in vestry assembled have refused to make a rate for the necessary repairs of the parish church, and proceedings be taken by the churchwardens

CHURCH RATES.
Rate made by the churchwardens.

(1) *Cundict v. Plomer*, 13 Co. 70. *Ante*, 871.

(2) *Cro. Jac.* 670.

(3) *Townsend v. Thorpe*, 2 *Ld. Raym.* 1507.

(4) *Gatton and Milwich (Parishes of)*, 2 *Salk.* 536.

(5) *Williams v. Vaughan*, 1 *Black.* (Sir W.), 28. *Rex v. Harris (D. D.)*, 3 *Burr.* 1420. *King's case*, 1 *Keb.* 517. *Evelin's case*, *Cro. Car.* 551. *Warner's case*, *Cro. Jac.* 532.

(6) *Nutkins v. Robinson*, *Bunb.* 247. *Snowden v. Herring*, *ibid.* 289.

(7) In *Watlington (Churchwardens of) v. Starky*, 2 *Salk.* 547., a prohibition was granted to stay a suit in the Ecclesiastical Court for taking away two bells out of the steeple, for these reasons, that "the churchwarden is a corporation, and the property is in him, and he may bring trover at common law;" *et vide* 2 *Inst.* 492. *Bellamie v. —*, 1 *Roll.* 255. *Gardner v. Parker*, 4 *T. R.* 351.

(8) *Welcome v. Lake*, 1 *Sid.* 281.

(9) *Goodall v. Whitmore*, 2 *Hagg.* 372.

WHEN A PROHIBITION WILL AND WILL NOT BE GRANTED.

A cause for subtraction of church rates is within the exceptive part of stat. 23 Hen. 8. c. 9.

Where validity of church rate is disputed, proceedings may be commenced in the Arches Court, by letters of request from the commissary of the bishop of the diocese.

When a custom for a church rate is denied in the Ecclesiastical Court.

Custom for assessing rates to repair the church.

Inhabitants of a chapelry can only be discharged by prescription from repairing their own chapel.

Where the jurisdiction of the Ecclesiastical Court is not affected by stat. 53 Geo. 3. c. 127. s. 7.

in the Ecclesiastical Court to enforce its payment, a court of common law will grant a prohibition. (1)

A cause for subtraction of church rates is within the exceptive part of stat. 23 Hen. 8. c. 9., and may be referred, by letters of request, to the Court of Arches, and the defendant may be cited out of his diocese. (2)

Where the validity of a church rate is disputed, a suit for subtraction of the rate may be commenced in the Arches Court, by letters of request from the commissary of the bishop of the diocese in which the defendant resides, stating that matters of difficulty may arise, and that the parties may require the assistance of civilians, or counsel practising in that court. (3)

By the bishop's inhibition, during his visitation, the jurisdiction of his commissary is superseded, and a party resident within the commissary's jurisdiction may then be cited before the bishop's official principal. (4)

If a custom for a church rate be pleaded in the Ecclesiastical Court, and the plea admitted, they may proceed to try the custom; but if denied, a prohibition will lie. (5)

A libel was exhibited on a custom, that the constable of the town should collect the rates assessed for repairing the parish church, which he refused to do; and on a motion for a prohibition, it was suggested, that it was not triable there, whether the party was constable and duly elected or not; but the Court denied the writ, because this matter was pleadable there, and that prohibitions ought not to be issued unless, upon a trial of the matter, the spiritual proceedings interfere with the common law. (6)

The inhabitants of a chapelry, though they repair their own chapel, are nevertheless contributory to the repairs of the mother church, from which they can only be discharged by prescription, for which, it has been said, a consideration ought to appear, as a payment of so much to the repair of the church, or to the wall of the churchyard, or to the keeping of a bell, or the like compositions, which are clearly a discharge (7), and upon which a prohibition may be obtained. (8)

Stat. 53 Geo. 3. c. 127. s. 7. gives power to a justice to enforce the payment of a sum under 10*l.* due upon a church rate, where the validity of the rate has not been questioned, nor the liability of the party, takes away the jurisdiction of the Ecclesiastical Court in such cases. But if the validity or liability be in question, the Ecclesiastical Courts have jurisdiction, though the party has not been summoned before a justice. Therefore, where a party not having been summoned before a justice, was libelled in the Consistory Court for a sum which, on the face of the proceedings, was less than 10*l.*, due upon a church rate, and sentence was given against him, the Court of King's Bench refused to grant a prohibition, upon the ground that the validity of the rate was questioned in the proceedings in the Ecclesiastical Courts. And afterwards, it appearing by more particular reference to the pleadings themselves, that they did not disclose whether or

(1) *Valey v. Burder (in error)*, 12 A. & E. 265.

(2) *Jolly v. Baines*, 4 P. & D. 224. 5 Jurist, 22.

(3) *Ibid.*

(4) *Reg. v. Thorogood*, 3 P. & D. 629. 4 Jurist, 937.

(5) *Dun v. Coates*, 1 Atk. 288. *Byerley v. Windus*, 5 B. & C. 1.

(6) *Goddin v. Wainwright*, Hardr. 510.

(7) *Gibson's Codex*, 197.

(8) *Peeter v. Edmonds*, 2 Rol. 265. *Aston (Parish of) v. Castle-birmidge Chapel*, Hob. 66.

not the validity was questioned, this court held, that that circumstance alone did not authorise a prohibition. (1)

It seems doubtful, where a church rate has been made for the repayment of money borrowed under certain acts, and a parishioner who refuses to pay the rate, on the ground that sufficient notice of borrowing the money was not given to the parish under those acts, has been libelled in the Arches Court, whether the Court of Queen's Bench has jurisdiction to prohibit the court below, after the libel has been admitted to proof, but before sentence. (2)

Prohibition lies to stay a suit for fees of chancellors, apparitors, proctors, or parish clerks, or registrars^r(3), because such fees are demands pro opere et labore, and are properly determinable at common law; and such fees cannot be settled by the canon law, because the denial of just fees is a disseisin. (4)

The Spiritual Court can order a proctor to refund money which is improperly in his hands. (5)

Prohibition, as previously observed, lies to the Ecclesiastical Court if it proceed to hear exceptions at the suit of a legatee, to an inventory exhibited by an executrix. (6)

And *In re Inman* (7), upon an application for a prohibition, to prevent the Ecclesiastical Court from granting administration with the will annexed in the case of a testamentary appointment by a married woman under a doubtful power, the party was ordered to declare in prohibition.

If a legatee take a bond from the executor for payment of the legacy, and afterwards sue him in the Spiritual Court for the legacy, a prohibition will be granted; for, by taking the obligation, the nature of the demand is changed, and it becomes a debt or duty recoverable in the temporal courts. (8)

Where a suit was instituted in the Spiritual Court to obtain a general probate of the will of a woman, made during her coverture, with the assent of the husband, and the wife had survived him, a prohibition was granted; for, by granting that probate, the Spiritual Court would be giving effect to a will which, by the general rules of law, could not have effect; for the husband could not by any assent enable his wife to dispose, by will made during the coverture, of property which she might acquire after his death, but only of property over which he himself had a disposing power. (9)

(1) *Ricketts v. Bodenham*, 4 A. & E. 433. 5 Dowl. P. C. 120.

(2) *Blunt v. Harwood*, 3 N. & P. 577.

(3) *Horton v. Wilson*, 1 Mod. 167. *Pulford v. Gerard*, 1 Ld. Raym. 703. *Clerk v. Lee*, 10 Mod. 261. *Cottingham v. Lofts*, ibid. 272. *Anon.* 12 ibid. 583. *Ballard v. Gerrard*, 1 Salk. 333. *Johnson v. Oxenden*, 4 Mod. 255.

(4) *Pearson v. Champion*, 2 Doug. 629.

(5) *Morris v. Gardner*, 1 Dowl. P. C. 524.

(6) *Griffiths v. Anthony*, 5 A. & E. 623. 5 Dowl. P. C. 223.

(7) 1 Scott, N. R. 379.

(8) *Goodwyn v. Goodwyn*, Yelv. 39. *Luke v. Alderne*, 2 Vern. 31. *Gardner's case*, 2 Rol. 160. *Barker v. May*, 9 B. & C. 489.

(9) *Scammell v. Wilkinson*, 2 East, 552. And see further as to suits of prohibition in causes testamentary, *Marquess de Winchester's case*, 6 Co. 23. (a). *Case de Orphans de Londres*, 5 ibid. 73. (b). *Smallwood v. Brickhouse*, 2 Mod. 316. Suits respecting marriage, *Harrison v. Burwell* (D. D.), Vaugh. 207. 220. *Hicks v. Harris*, Comb. 200. *Collet's case*, Jones (Sir T.), 213. *Anon.* 2 Mod. 314. Suits relating to the making of church rates, F. N. B. 50. *Jeffrey's case*, 5 Co. 67. (b). *Holland v. Kirton*, 2 Rol. 463. *Anon.* Poph. 197. *Robert's case*, Hetl. 61. *Anon.* 1 Vent. 367. Suits for the payment of church rates, *Thursfield v. Jones*, Jones (Sir T.), 187. *Watkins v. Seaman*, 2 Lutw. 1019. *Woodward's case*, 3 Mod. 211. Comb. 132. *Ball*

WHEN A PROHIBITION WILL BE GRANTED.

Where a libelled party has refused to pay church rates, because certain statutes have not been complied with.

Fees of chancellors, apparitors, proctors, parish clerks, or registrars.

Proctor can be ordered to refund money in his hands.

Ecclesiastical Court proceeding to hear exceptions at the suit of a legatee to an inventory exhibited by executrix.

Granting administration under a doubtful power.

Legatee taking a bond from executor, and afterwards suing for the legacy in the Ecclesiastical Court.

WHEN A PROHIBITION WILL AND WILL NOT BE GRANTED.

PARTY SUED IN THE SPIRITUAL COURT FOR THAT WHICH WOULD AT COMMON LAW SUPPORT DEBT, CASE, TRESPASS, OR TROVER.

If a person be sued in the Spiritual Court for that which would at common law support an action of debt, trespass, case, or trover, a prohibition will be granted. Thus, a prohibition was granted to stay a suit in the Spiritual Court for breaking open a chest in the church, for taking away the title deeds of the advowson, because for such an asportation trespass or trover could have been maintained in the temporal courts. (1)

So, if A. call B. whore and thief, the action shall be sued at common law; and B. cannot libel against A. in the Spiritual Court for the word whore, and have an action at law for the word thief. (2) So, if A. say of B. you are a bawd, and thou keep a bawdy-house; the keeping a bawdy-house being a matter indictable at common law, makes the matter of temporal cognisance; but calling "whore" or "bawd" only, is punishable in the Ecclesiastical Courts. (3)

When a suit is instituted in the Spiritual Court for defamation, and the defamatory words are libelled as forming one article of charge, and the sentence appears, on the face of it, to have proceeded upon all the words complained of, a prohibition will be issued, if part of the words contain imputations for which an action at common law would lie, though other parts contain matter which is properly of ecclesiastical cognisance.

If in cases of defamation the Spiritual Courts have concurrent jurisdiction with the temporal, and a spiritual person be aggrieved, it applies only where the party is affected in his ecclesiastical character. Not, therefore, where a clergyman is defamed as having indecently assaulted a woman on the highway. (4)

But on a motion for a prohibition for saying of a parson that he preaches nothing but lies and malice in the pulpit, on suggestion that these words were actionable at common law, the Court refused to grant it; for such words concerning and relating to an ecclesiastical person and in an ecclesiastical matter, were fit to be tried by the Spiritual Court. (5)

Where the words were, "You are known by the name of bawdy Nell, and do live with another woman's husband;" and an action being brought at law for these words, grounded on a special damage sustained by the defendant's speaking them, and also a suit in the Ecclesiastical Court, an application was made for a prohibition; because, being actionable at law, by reason of the special damage, the party ought not to be twice punished for the same offence; but the Court refused to grant a prohibition. (6)

The punishment for defamation is discretionary in the Ecclesiastical Court. Therefore, where a defendant was sentenced to acknowledge, that he believed the life and conversation of a woman, whom he had defamed, to be "sober, chaste, and honest," at the time of doing the penance, the Court of King's Bench held, that the Ecclesiastical Court had not exceeded its jurisdiction. (7)

v. *Cross*, 1 Salk. 164. *Dawson v. Wilkinson*, C. T. H. 381. *Andr.* 11. *Rex v. Haworth* (*Chapelwardens of*), 12 East, 556. *Lanchester v. Thompson*, 5 Madd. 4. Suits relating to churchwarden's accounts, *Wainwright v. Bagshaw*, 2 Str. 974. Suits respecting the occupation of pews, *Byerley v. Windus*, 5 B. & C. 1. 7 D. & R. 564.

(1) *Gardner v. Parker*, 4 T. R. 351.

(2) 2 Rol. Abr. *Prohibition* (N), 295. pl. 3, 4. *Gallissand v. Rigaud*, 2 Ld. Raym. 809.

(3) *Galizard v. Rigault*, 2 Salk. 552.; *et vide* 2 Inst. 488.

(4) *Erans v. Gwyn* (*Clerk*), 5 Q. B. 844.

(5) *Cranden v. Walden*, 3 Lev. 17.

(6) *Evans v. Brown*, 2 Ld. Raym. 1101.

(7) *Birch v. Brown*, 1 Dowl. P. C. 395.

Spiritual Courts have no jurisdiction as to crimes and capital offences, so as to punish persons guilty of treason, felony, or other offences, which are cognisable in the king's temporal courts. Thus, if the Spiritual Court proceed against a man for writing a libel, a prohibition lies; for this is an offence indictable at common law. (1) But a spiritual person may, especially after a conviction for a criminal offence at common law, be proceeded against *pro salute animæ*, and in order to a deprivation. (2) And this jurisdiction has been granted to them from a necessity of purging their body of all scandalous members. But they cannot inflict a collateral punishment for such matters as are only indictable at common law; and if they take upon them to do so, a prohibition lies. (3)

WHEN A PROHIBITION WILL AND WILL NOT BE GRANTED.

Spiritual Courts have no jurisdiction as to crimes and capital offences. Libel.

If a clerk be convicted of homicide or manslaughter, and afterwards libelled against, the libel ought not to charge that he is an homicide, or that he is guilty of manslaughter, &c., and if it do, a prohibition lies. But the regular way is only to charge that he was convicted of homicide, &c., and so the sentence of deprivation ought to be grounded on the conviction in the temporal court, without any further examination of the matter, by which the verdict there given is not to be impeached, but affirmed. And though the person convicted desire that he may be admitted to his defence in the Spiritual Court, to prove his innocency against the verdict, yet this is not to be allowed him, because this would be to impeach in an improper court a sentence given in a proper court. (4)

A clerk convicted of homicide or manslaughter.

If a matter of ecclesiastical cognisance be made felony or treason by act of parliament, the Spiritual Courts (unless there be a saving of their jurisdiction in such statute) cannot take cognisance thereof, nor of any defamation in relation thereto. (5)

Matter of ecclesiastical cognisance made felony or treason by statute.

Where a libel was exhibited in the Ecclesiastical Court against a woman *causâ jactitationis maritagii*, and she suggested that the person libelling was indicted at the Old Bailey sessions for marrying her, he then having a wife living, *contrâ formam statuti*, and that he was thereupon convicted, and had judgment to be burnt in the hand; that being tried by a jury and a court which had a jurisdiction of the cause, and the marriage found, a prohibition was prayed and granted. (6)

Woman pleading bigamy by her husband.

The Ecclesiastical Courts cannot punish or hold plea *pro reformatione morum* in case of legal perjury, or *pro læsione fidei* in a temporal matter; as, that the party will pay a debt, make a feoffment, &c. So, if a jury give a false verdict, they cannot be punished for this in the Ecclesiastical Courts. (7)

Perjury.

But for perjury in their own courts, and in matters in which they have cognisance, as matrimony, tithes, testaments, &c. they may punish, and no prohibition lies. (8)

If a layman forge orders and obtain a benefice, for which he is prosecuted in the Ecclesiastical Court in order to deprivation, the writ will not be

A layman forging orders and acquiring a benefice.

(1) *Anon. Comb.* 71.

(2) *Free (D. D.) v. Burgoyne*, 5 B. & C. 400.

(3) *Keilw.* 181. *Dyer*, 293. *Searle's case*, Cro. Jac. 430. *Layton v. Grange*, March, 174. *Searle v. Williams*, Hob. 288. *Townsend v. Thorpe*, 2 Ld. Raym. 1507.

(4) *Searle's case*, Hob. 121. 288. Cro. Jac. 430.

(5) *Higgon v. Coppinger*, Jones (Sir W.), 320.

(6) *Boyle v. Boyle*, 3 Mod. 164.

(7) F. N. B. 42. 2 Rol. Abr. *Prohibition* (R), 304. pl. 9.

(8) *Anon. Jenk.* 184. *Keilw.* 39. (b).

WHEN A PROHIBITION WILL AND WILL NOT BE GRANTED.

Offences punishable in the leet.

Assaulting and beating a clergyman.

issued, for the forgery is touching an ecclesiastical matter, and he is suable there for it, in order to his deprivation only. (1)

If a presentment be made by the churchwardens of a parish in the Ecclesiastical Court, that J. S., a parishioner, is a railer and sower of discord among the neighbours, a prohibition lies; for this belongs to the leet, and not to the Spiritual Court, unless it was in the church. (2)

The Ecclesiastical Courts have in some instances a concurrent jurisdiction with the temporal courts, as in laying violent hands on a clerk, a pension by prescription, &c. (3) So that if a clergyman be beaten, an action at law lies for the battery; as also a suit in the Spiritual Court for irreverence to his character. But such proceedings in the Ecclesiastical Court must be pro salute animæ, and to punish the sin, not to recover damages. (4)

If a clerk be arrested by process of law, he cannot for this sue in the Ecclesiastical Court (5); and if a person be proceeded against for defamation in the Spiritual Court for giving evidence in a court of justice, he may have a prohibition. (6)

If a clergyman be only assaulted, no remedy can be had in the Spiritual Court, but only in the common law courts. (7)

So, if one be sued in the Ecclesiastical Courts for laying violent hands on a clergyman, the party being an officer or constable, may suggest, that the plaintiff made an affray upon another, and that he, to preserve the peace, laid hands on him, and so have a prohibition. (8)

Under stat. 5 & 6 Edw. 6. c. 4. against brawling, &c. in a church or churchyard, it has been held, that he who strikes another in a church or churchyard, cannot justify or excuse himself by showing that the other assaulted him. (9) But he may justify in laying hands on a clerk in any other place (10)

Also it is said, that though the crime of laying violent hands on a clergyman be within the express words of the statute of *Circumspecte agatis*, that the party is not punishable in the Spiritual Court before he is found guilty in a temporal court; and that if he be proceeded against sooner, a prohibition lies. (11)

Stat. 27 Geo. 3. c. 44. applies to laymen and clergymen.

The stat. 27 Geo. 3. c. 44. limiting the proceedings in the Ecclesiastical Court for fornication and incontinence to eight months from the offence committed, applies to proceedings against fornicators, whether laymen or clergymen, pro salute animæ. (12)

A prohibition will go to an Ecclesiastical Court as to proceedings upon a charge of fornication committed more than eight months before, for reform-

(1) *Slader v. Smalbrooke*, 1 Lev. 138. 1 Sid. 217. *Smallbrook v. Slaughter*, 1 Keb. 721. 762.

(2) 2 Rol. Abr. *Prohibition* (F), 286. pl. 45. *Smith v. Pannell*, Hob. 246. Hetl. 132.

(3) *Lincoln (Bishop of) v. Smith*, 1 Vent. 3. Anon. ibid. 120. Ibid. 265. *Jones v. Stone*, 1 Ld. Raym. 578. 2 Salk. 550. *Parker v. Clerk*, 6 Mod. 252.

(4) 2 Inst. 492. 9 Edw. 2. st. i. c. 6. Stephens' Ecclesiastical Statutes, 35. *Kelley v. Walker*, Cro. Eliz. 655. *Collins v. Jessot*, 6 Mod. 156. *St. Alban's (Abbot of) case*, 4 Co. 20. (a).

(5) 2 Inst. 492.

(6) Bro. *Prohibition*, 21. *Rex v. Briggs*, 2 Bulst. 296. *Anfild v. Feverill*, 1 Rol. 61. *Webb v. Cook*, Cro. Jac. 535.

(7) *Prynne's case*, 6 Bac. Abr. *Prohibition* (I), 596.

(8) 2 Inst. 608.

(9) *Frances v. Ley*, Cro. Jac. 367.

(10) *Kelley v. Walker*, Moore (Sir F.), 915. Cro. Eliz. 655.

(11) *Rigaut v. Gallifard*, 7 Mod. 80.

(12) *Free (D. D.) v. Burgoyne (in error)*, 2 Bligh, N. S. 65. 6 B. & C. 538. ; et vide S. C. Ibid. 27. 5 Ibid. 400.

ation of manners, but a consultation will be awarded as to proceedings for deprivation. (1)

WHEN A PROHIBITION WILL AND WILL NOT BE GRANTED.

But a proceeding in the Ecclesiastical Court against a clergyman on the ground of fornication, for the purpose of deprivation, suspension, or other punishment, merely clerical, is not within the statute. (2)

If a parish clerk be guilty of scandalous offences which are punishable at common law, yet he may be proceeded against in the Spiritual Court in order to a deprivation, though his office be for life. (3)

Parish clerk guilty of scandalous offences.

In case of criminal conversation with a man's wife, an action lies at common law, in which the husband recovers damages (4), and the offender is likewise punishable in the Ecclesiastical Court for adultery.

Adultery.

So, in case of a lewd woman who has a bastard chargeable on the parish, though by the statute 7 Jac. 1. c. 4. she is to be sent to the house of correction, yet she may be proceeded against for incontinency in the Spiritual Court. (5)

Incontinency.

But where, during the pendency of an action for assault and battery with intent to ravish the wife of another, the husband also libelled the aggressor in the Ecclesiastical Court, for having solicited the chastity of his wife, and which appearing on the pleadings, it was held, that a prohibition ought to be granted; for that this being an attempt and solicitation to incontinence, coupled with force and violence, it did, by reason of the force, become a temporal crime *in toto*. (6)

A writ of prohibition will not be granted if the wrong be immaterial: thus, in *Butterworth v. Walker* (7) Lord Mansfield, when discharging a rule for a prohibition, observed, "The ground we go upon is, that a prohibition will not be material."

Prohibition will not be granted where the consequences will not be material. Mere irregularity of practice.

A prohibition to an Ecclesiastical Court, in a cause which is clearly of ecclesiastical cognisance, does not lie where there has been an irregularity in the practice, because the temporal courts cannot take notice of the practice of the Ecclesiastical Courts, or entertain a question whether, in any particular cause admitted to be of ecclesiastical cognisance, the practice has been regular. (8) In fact, the only instances in which the temporal courts can interfere to prohibit any particular proceeding in an ecclesiastical suit, are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the court. (9)

Where a *significavit* of the sentence of an Ecclesiastical Court having been set aside by the Court of Chancery, in consequence of an ambiguity appearing in the sentence, and no subsequent proceedings having been taken, and there appearing no intention to proceed, the Court refused an application for a prohibition, on the ground, that no good *significavit* could issue on such a defective sentence. (10)

Where no good *significavit* could issue on a defective sentence.

(1) *Free (D.D.) v. Burgoyne (in error)*, 2 Bligh, N. S. 65. 6 B. & C. 538.; *et vide* 8 C. 1bid. 27. 5 Ibid. 400.

(2) Ibid.

(3) *Townsend v. Thorpe*, 2 Ld. Raym. 1507. Fitzg. 189.

(4) *Young v. Pridd*, Cro. Car. 89. *Hyde v. Symor*, Cro. Jac. 538. *Anon. Jones* (Sir W.), 440.

(5) *Rigaut v. Gallisard*, 7 Mod. 80.

(6) Ibid. nom. *Galizard v. Rigault*, 2 Salk. 552. S. C. nom. *Gallisard v. Rigaud*, 2 Ld. Raym. 809. *post*, 1061.

(7) 3 Burr. 1689.

(8) *Exp. Smyth*, 3 A. & E. 719.

(9) Ibid.

(10) *Bodenham v. Ricketts*, 2 H. & W. 132.

WHEN A PROHIBITION WILL AND WILL NOT BE GRANTED.

When parties have a remedy by indictment.

It will not be presumed that the Court below will decide contrary to law.

Judgment of Lord Denman in *Griffin v. Ellis*.

The Court of King's Bench refused a prohibition on application of the inhabitants of Dorsetshire to restrain the justices of the county from pulling down an old bridge before the new one was passable, the application being a novel one, and the parties having a remedy by indictment if the act were a nuisance. (1)

Where the suit is cognisable by the Ecclesiastical Court, it will be presumed by the temporal courts, that they will administer the law correctly; thus, in *Griffin v. Ellis* (2) Lord Denman observed, "This was a declaration in prohibition to the Court of Arches, to prevent an enforcement of a church rate.

"The proceedings in the court christian are set out, and show a rate duly made in consequence of a vote of vestry, October 29th, 1834, by churchwardens, with assent of the parishioners, and good on the face of it. The plaintiffs in prohibition, sued in the court christian, put in a defensive allegation that the rate was designed to be applied to paying off debts previously incurred; in answer to which, the churchwardens allege that, on the 17th October, 1833, a vestry was convened to consider of a church rate, the church requiring repair, and an estimate of the sum required laid before it; but the meeting was adjourned for a year, and no church rate granted, whereby the churchwardens were obliged to incur debts; and, at a subsequent meeting, the vestry came to a resolution to impose the present rate in order to pay the debts so incurred, which were expressly sanctioned by the vestry. This responsive allegation the Court of Arches admitted.

"Various points were made: 1. Whether the rate, being in its form regular and lawful, was vitiated by any design to employ in any manner; for, if the employment of it should be unlawful, appeal might be made against the churchwardens' accounts. 2. Whether this rate is bad, as being retrospective, under the peculiar circumstances of the case, the debt having been incurred by the neglect of the parish to vote a church rate when wanted, as was admitted by the vote of vestry afterwards, when the debt was expressly sanctioned. 3. Whether, even if these defects should be held fatal, they entitled the plaintiff to his writ of prohibition, which assumes the court christian to have exceeded its jurisdiction, or were only grounds of appeal, the suit itself being matter of ecclesiastical cognisance, and the defence stated being such as that court is able, and indeed bound, to give effect to, if valid in point of law.

"On this last ground, on the authority of many cases, we think that the demurrer must prevail, and a consultation be awarded.

"It has been often held that an erroneous judgment on matters within the cognisance of the court christian will not entitle to prohibition, but only to appeal. If, on appeal, their sentence should be of such a nature as to show a defect of jurisdiction on the face of the proceedings, application to prohibit may then be made. In the mean time, we must presume that the court christian will correctly administer the law.

"The case of *Chesterton v. Farlar* (3), lately before the judicial committee of the privy council, cited for the purpose of proving this rate illegal, was decided by that court as a superior Spiritual Court on appeal.

(1) *Rex v. Dorset (Justices of)*, 15 East, 594.

(2) 11 A. & E. 743

(3) 1 Curt. 345. 367. 371.

And the case of *Brettell v. Wilmot* (1), on which *Chesterton v. Farlar* was mainly founded, occurred also in the Court of Arches, on appeal from the Consistory Court of London."

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Where the plaintiff declared, in prohibition, that he had been libelled by the defendant in a Spiritual Court, for non-payment of a church rate, and that he had excepted to the libel on different grounds, one of which was, as to the construction of an act of parliament, and averred that the exceptions were not the subject of ecclesiastical cognisance, and therefore prayed for a writ of prohibition: it was held, that he had shown no ground for prohibition, as it did not appear that the court below was proceeding to decide on the act of parliament, or that it would decide contrary to the common law. (2)

If the Court of Chancery and the Spiritual Courts have a concurrent jurisdiction, the Court of Chancery will not hinder the Spiritual Courts, if first possessed of a case, from proceeding in it. (3) The temporal courts have held a similar doctrine, or (if the expression concurrent jurisdiction be not strictly applicable to courts existing for different purposes) they have refused a prohibition where the whole matter of the issue has been under the cognisance of the spiritual, as well as of the temporal courts. Thus, tithes after severance have been sued for in the Spiritual Courts, though liable also to an action for trespass. (4)

WHERE THE JURISDICTIONS ARE CONCURRENT, THE SPIRITUAL COURT, IF FIRST POSSESSED OF A CASE, WILL NOT BE HINDERED FROM PROCEEDING IN IT.

Tithes after severance.

Where executors have given a bond for a legacy, the obligee has been held not to be debarred by acceptance of the bond from suing in the Spiritual Court for a legacy. (5) A suit has been permitted to be instituted in the Spiritual Court at York *pro rationabili parte bonorum*, according to the custom of that province, though the party had a remedy at common law. (6) And in the older books it is also said, a pension might be sued for in the court christian, as well as an action for annuity in the court temporal. (7)

When executors have given a bond for a legacy.

Suit "*pro rationabili parte bonorum*."

A prohibition has been refused for proceedings for a nuisance in a churchyard, for though that be a lay fee, the nuisance is of ecclesiastical cognisance. (8)

Nuisance in a churchyard.

Prohibitions are not grantable in matters purely spiritual; thus stat. 13 Edw. 1. st. iv. (9) contains the following directions:—

Prohibition not grantable in matters purely spiritual.

Stat. 13 Edw. 1. st. iv.

"The king to his judges sendeth greeting. Use yourselves circumspectly in all matters concerning the Bishop of Norwich (10) and his clergy, not punishing them if they hold plea in court christian of such things as be mere spiritual (11), that is, to wit, of penance enjoined by prelates for deadly sin, as fornication, adultery, and such like, for the which sometimes corporal penance, and sometimes pecuniary, is enjoined, specially if a freeman be

(10) *In all matters concerning the Bishop of Norwich and his clergy*:—The Bishop of Norwich is here put only for example; but it extends to all the bishops within the realm. 2 Inst. 487. This statute was, however, granted in consequence of a petition from the Bishop of Norwich; in fact, acts of parliament in ancient times were generally founded on antecedent petitions.

(11) *Of such things as be mere spiritual*:—Not having any mixture of temporalities—as heresy, schisms, holy orders, and the like. 2 Inst. 488.

(1) 2 Lee (Sir G.), 548.

(2) *Hall v. Maule*, 7 A. & E. 721.

(3) *Nicholas v. Nicholas*, Pre. Ch. 546.

(4) *Blackwell's case*, Cro. Eliz. 843.

(5) *Gardner's case*, 2 Rol. 160. *Luke v. Alderne*, 2 Vern. 31.

(6) *Trafford v. Trafford*, 2 Lev. 128. *Blackwell v. Artell*, 2 Vern. 47.

(7) *Collier's case*, Cro. Eliz. 675.

(8) 18 Vin. Abr. *Prohibition* (B. a), 30. *Quilter v. Newton*, Carth. 152.

(9) *Vid.* Stephens' Ecclesiastical Statutes, 24.

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convict of such things: also if prelates do punish for leaving the church-yard unclosed, or for that the church is uncovered, or not conveniently decked, in which cases none other penance can be enjoined but pecuniary. Item, if a parson demand tithes greater or smaller, so that the fourth part of the value of the benefice be not demanded. (1) Item, if a parson demand mortuaries (2), in places where a mortuary hath been used to be given. Item, if a prelate of a church demand of a parson a pension due to him, all such demands are to be made in a spiritual court. And for laying violent hands on a clerk, and in cause of defamation, it hath been granted already, that it shall be tried in a spiritual court, when money is not demanded, but a thing done for punishment of sin. In all cases afore rehearsed the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."

By the statute of *Circumspecte agatis* (13 Edw. 1.) the authority of the Spiritual Court to punish for neglect to repair or adorn the church is confirmed; and therefore, if a suit be there instituted for this cause, a prohibition will not lie. (3) By the word "church" is intended not only the body thereof, walls, windows, and covering (4), but also any public chapel annexed to it; but this extends not to any private chapel, though it be affixed to the church, for that must be repaired by him who has the proper (exclusive) use of it, for he that has the profit ought to bear the burden. (5)

No prohibition to be found in the register or elsewhere, concerning the questioning of any marriage in the Spiritual Court.

In *Harrison v. Burwell* (Dr.) (6) it was observed, that no prohibition was to be found in the register, or elsewhere, concerning the questioning of any marriage in the Spiritual Court, before the ecclesiastical acts of parliament, nor until long after some of them; and it was also confessed (7), that neither stat. 25 Hen. 8. c. 22. (8), nor stat. 28 Hen. 8. c. 7. (9), gave any additional jurisdiction to the temporal courts, concerning marriages, beyond that which they had before, being acts directory only as to ecclesiastical proceedings in matters of marriage. (10) It was, however, declared, that by this act the temporal courts, became the proper judges, what marriages were within or without the Levitical degrees; and were to prohibit the Spiritual Courts, if they impeached any persons for marriages without those degrees. But Vaughan observed in *Harrison v. Burwell* (11), and repeated that declaration in *Hill v. Good* (12), that if granting prohibitions to the Spiritual Courts in cases of matrimony were *res integra* now, he saw no reason why they should be granted in any case; but that there having been so many precedents of prohibitions, and no complaint, or at least redress, in parliament, they could not take upon them to alter the course of the law so long practised.

Watkinson v. Mergatton.

But in *Watkinson v. Mergatton* (13) a prohibition was prayed to the

(1) *So that the fourth part of the value of the benefice be not demanded*: — Upon these words Lord Coke thus comments — "So as at this day, in case when one person of the presentation of one patron demand tithes against another person of the presentation of another patron in court christian, amounting to a fourth of the value of the benefice. The right of tithes at this day, is to be tried at the common law." 2 Inst. 491.

(2) *Johnson v. Oldham*, 1 Ld. Raym. 609.

(3) Com. Dig. *Prohibition* (G 2.).

(4) Lyndwood, Prov. Const. Ang. 53.

(5) 2 Inst. 489.

(6) Vaugh. 213.

(7) Ibid. 216.

(8) Stephens' Ecclesiastical Statutes, 172.

(9) Ibid. 205.

(10) *Harrison v. Burwell* (D.D.), Vaugh. 209. 2 Vent. 14.

(11) Vaugh. 220.

(12) Ibid. 304.

(13) Raym. (Sir T.), 464.

Spiritual Court at York, to hinder a prosecution there for marrying the sister's daughter; but it was denied by the whole court, upon this general reason: "Because it is a cause of ecclesiastical cognisance, and divines better know how to expound the law of marriages, than the common lawyer; and though sometimes prohibitions have been granted in causes matrimonial, yet if it were now *res integra*, they would not be granted."

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In *Collet and Collet* (1) a prohibition to the Spiritual Court was prayed, to hinder them from proceeding to a divorce, where a man had married the sister of his first wife, and the suggestion was, that the issue of that marriage would be bastardised in case of such divorce, and deprived of certain lands settled upon them in marriage. But the Court said, this was not sufficient matter of suggestion; for here the Spiritual Court held not plea of the temporal inheritance directly, but consequently; for which, if they should be prohibited, they would have no subject for adjudication.

Collet v. Collet.

In *Hinks v. Harris* (2) the second wife, who was sister to the first, died, pending the suit for an incestuous marriage in the Spiritual Court; notwithstanding whose death, and the husband's pleading it, the Court proceeded to declare the marriage null and void. But a prohibition was granted, forbidding the Spiritual Court from rendering the marriage void; because they could only proceed against Hinks, after the death of his wife, *pro salute animæ*. (3)

Hinks v. Harris.

In *Collins v. Jessot* (4), upon motion for a prohibition to the Spiritual Court, for libelling there to dissolve a marriage because of a precontract, it was affirmed, that in case of a contract *per verba de futuro*, the cognisance might be either in the Spiritual Court, upon precontract or no precontract, or in the temporal court, for damages; and each court to forbear upon showing process in the same matter, before the other. But as to the cognisance of matrimonial cases in general, the Court agreed as follows:—"The Spiritual Court have jurisdiction of all matrimonial causes whatsoever, and where it appears to us, that the cause is spiritual, of which a consequence they have cognisance, unless it be by reason of some collateral temporal matter in it, we ought not to prohibit them. And it is no reason here to prohibit them, because this may be a future contract, for breach of which an action at law will lie; no more than when they libel for laying violent hands upon a spiritual man, for which an action at law lies for him for the battery, and a suit in the Spiritual Court for the irreverence to his character."

Collins v. Jessot.

To the first of these rules may be referred the case of *Haines and Jessot* (5), in which a prohibition was prayed to the Spiritual Court on a suit there, against a man for marrying his sister's bastard daughter, as not within the Levitical law. But it was urged against the prohibition, that in this case, legitimacy or illegitimacy made no difference, and that if a bastard be not within the rule, "*Ad proximum sanguinis non accedat*," then a mother may marry her bastard son. The Court seemed inclined not to grant a prohibition; but the cause was adjourned, and it does not appear what became of it.

Haines v. Jessot.

(1) Skin. 37.

(2) Carth. 371.

(3) By stat. 5 & 6 Gul. 4. c. 54. mar-

riages within the prohibited degrees are rendered absolutely void.

(4) 6 Mod. 155.

(5) 5 Ibid. 168.

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Prohibition does not seemingly lie to restrain a bishop from committing waste, or to restrict the ordinary from granting a faculty for stopping up a church window and erecting a monument.

Prohibition will in some cases be granted, although the original subject be within the ecclesiastical jurisdiction.

A prohibition does not lie from the Court of Common Pleas, nor (seemingly) from any of the courts of common law, to restrain a bishop from committing waste in the possession of his see, at least at the suit of an uninterested stranger. (1)

A prohibition was refused on application by a rector, to restrain the ordinary from granting a faculty to a parishioner, for stopping up a church window and erecting a monument, after the rector had expressed his dissent on citation; for the Spiritual Court had jurisdiction of the matter, and if the rector's dissent were improperly disregarded, that was matter of appeal, not of prohibition. (2)

In *Hallack v. Cambridge (University of)* (3) it appeared in a suit in the Court of Arches that a faculty conferring certain privileges in a parish church was prayed for, petitioned against, and answer and reply put in, and admitted by the Court; the suit was at issue, and the Court had ordered it to be proceeded with. On declaration in prohibition and demurrer it was held, that prohibition did not lie, several distinct things being comprised in the faculty, some of which might be granted consistently with the common law, though others (it was contended) might not; and no question having yet been raised in the Ecclesiastical Court as to its jurisdiction to grant any in particular, nor any intimation given by the Court of its intention to grant or refuse any. (4)

The writ of prohibition will, in some cases, be granted, although the original subject is within the ecclesiastical jurisdiction. Thus in *Veley v. Burder* (5) Chief Justice Tindal observed, on the question as to whether there should not have been an appeal instead of an application for a prohibition, "The question is, whether the Spiritual Court, having admitted the libel of the churchwardens to proof, that is, in effect, having decided upon the validity of such rate, the libel itself showing upon the face of it that the rate is a nullity at the common law, the Queen's writ of prohibition may issue. And we are all of opinion that, in such a case, the writ of prohibition well lies. . . .

"As to the decided cases, it appears that prohibitions have been granted where the Ecclesiastical Court is proceeding to compel a person to contribute to the repair of a parish church as an inhabitant, whose land in the parish is on lease (6); or where a person is charged in the parish where he inhabits, in respect of land out of it (7); or, where a man who takes a standing in the market in one parish, but dwells in another, is sued for the repairs of the church of the former parish (8); or, where one is rated in respect of land for ornaments (9); or, where the rate is on some of the inhabitants only (10); or, where the suit is to enforce an ancient rate, made some time before, and which had been made originally by Commissioners of the Ecclesiastical Court (11); or, where the bishop's commissioners made a rate, and the suit was to enforce it (12); or, where the rate was made by

(1) *Jefferson v. Durham (Bishop of)*, 1 B. & P. 105.; sed vide *Winchester (Bishop of) v. Wolgar*, 3 Swanst. 493—499.

(2) *Bulwer (Clerk) v. Hase*, 3 East, 217.

(3) 1 Q. B. 593. 9 Dowl. P. C. 583.

(4) *Quære*, Whether prohibition lies in any case against the granting of a faculty, before it be granted?

(5) 12 A. & E. 310. 313.

(6) *Jeffrey's case*, 5 Co. 67. (b).

(7) 17 Vin. Abr. tit. *Prohibition* (H), pl. 4.

(8) 2 Rol. Abr. *Prohibition* (H), pl. 5.

(9) Ibid. (K), pl. 1.

(10) Ibid. pl. 10.

(11) *Blank v. Newcomb*, 12 Mod. 327.

(12) *Rogers v. Davenant*, 1 ibid. 194. 2 Ibid. 8.

the churchwardens, without calling together the parishioners; or, for a parish rate, for making and repairing a parish organ. (1) In all these and many other cases, the prohibition was allowed to issue, although no one doubts but that the whole subject-matter of church rates, and the enforcing of them, is within the jurisdiction of the Spiritual Court. In all these cases, too, the same argument would have applied, which has been urged in the present case before us, viz. that the objection is a proper matter of appeal, and not of prohibition; for that it is not to be assumed that the Ecclesiastical Court will do wrong. What real distinction, indeed, can be made between a rate that is held to be void, on the ground of its being imposed by the bishop's commissioners, and a rate that is imposed by the mere authority of the churchwardens."

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If the Spiritual Court proceed wholly on their own canons, they will not be controlled by the common law (unless they question a matter not triable before them, as the bounds of a parish, or the like); for they will be presumed to be the best judges of their own laws: and therefore, if a person be aggrieved, his proper remedy is not by prohibition, but by appeal. (2)

Spiritual Court will not be hindered from proceeding by the canon law, unless it be in derogation from the common law.

If the grant of a faculty to appropriate certain parts of a parish church be within the jurisdiction of the Ecclesiastical Court, the Court of Queen's Bench will not presume that that jurisdiction will be improperly exercised, and therefore will not prohibit the Ecclesiastical Court from proceeding to judgment, although the faculty prayed for is larger than that Court has power to grant. (3)

Where faculty prayed for is larger than the Court can grant.

It was formerly held, that when there was a proceeding *ex officio* in the Ecclesiastical Court, the Court was not bound to give the party a copy of the articles; but the law is otherwise, for in such cases if they refuse to give a copy of the articles, a prohibition will issue until they deliver it. (4)

Refusal of a copy of the libel in the Spiritual Court.

In *Searle's case* (5) Chief Justice Montague said, "It is a rule, not to grant a prohibition where the proceedings in Ecclesiastical Courts are not against the law of the land, nor the liberty of the subject." (6) For, as on the one hand the Courts of Westminster lend the Ecclesiastical Courts a parental assistance in aiding the compulsive powers of their jurisdiction; so, on the other, they are obliged sometimes to exercise a parental authority by restraining those powers within their proper limits. (7)

If a man libel for two distinct things, the one of which is of ecclesiastical cognisance, and the other not; a prohibition will only be granted as to that which is of temporal cognisance, and they of the court christian can proceed for the other. (8)

Where a libel exhibits two distinct things, one of ecclesiastical cognisance, and the other not.

Where it appeared in *Galizard v. Rigault* (9) that there was an indictment for assaulting, beating, wounding, and endeavouring to ravish the wife of B., upon which the party was convicted; and afterwards the

(1) *Anon.* 12 Mod. 416.

(2) *Ayliffe's Parergon Juris*, 171—438.

(3) *Hullock v. Cambridge (University of)*, 9 Dowl. P.C. 588.

(4) Such a prohibition is usually called a prohibition *quousque*, as distinguished from an absolute prohibition to proceed at all in the matter.

A prohibition was denied to the Admiralty Court, upon a suggestion that they refused to give the party sued there a copy of the libel,

because stat. 2 Hen. 5. c. 3. extends only to the Ecclesiastical Courts. *Anon.* 1 Ld. Raym. 442. *Treil v. Edwards*, 6 Mod. 308.

(5) *Cro. Jac.* 431.

(6) *Ibid.*

(7) 3 Black. Com. 103.

(8) *Pense v. Prouse*, 1 Ld. Raym. 59. *Free (D.D.) v. Burgoyne*, 6 B. & C. 538.

Curslake v. Mapledoram, 2 T. R. 473.

(9) 2 Salk. 552.

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husband brought an action of trespass, and also libelled the party in the Spiritual Court for soliciting her chastity, a prohibition was applied for to restrain the proceedings in the Spiritual Court. It was urged for the jurisdiction of the Spiritual Court, that they may punish for the solicitation and incontinence, and that this suit was for the health of the soul; the action was for fine and damages. But the Court granted the prohibition, for it being an attempt and solicitation to incontinence, coupled with force and violence, it did by reason of the force, which was temporal, become a temporal crime in toto; as if any one say, thou art a whore and a thief, or thou keepest a bawdy house, which are temporal matters, the party cannot proceed in the Spiritual Court; but if it were only thou art a whore, a libel lies in the Spiritual Court. So if it be said of a woman, that she is a bawd only, and not that she keeps a bawdy house. But per C. J. Holt, "If one commit adultery, and the husband bring assault and battery, this will not hinder the Spiritual Court, for it is a criminal proceeding there, and no indictment lies at common law for adultery."

Trying temporal incidents by the rules of the temporal law.

If the principal matter belong to the cognisance of the Spiritual Court, all matters incidental (though otherwise of a temporal nature) are also cognisable there; and no prohibition will lie, provided they proceed in the trial of such temporal incidents according to the rules of the temporal law; but if otherwise, it lies even after the sentence, although the objection does not appear upon the face of the libel, but is collected from the whole of the proceedings. (1)

Thus in *Shotter v. Friend* (2), an executor being sued for a legacy in the Spiritual Court, pleaded payment, and offered to prove it by one witness; which the judge refused, and gave sentence against him. Upon these proceedings, a prohibition was moved for. When the Court said: 1. "Where the Ecclesiastical Court proceed in a matter merely spiritual, if they proceed in their own manner, though that is different from the common law, no prohibition lies: as in probate of wills, there, if they refuse one witness, no prohibition lies. 2. Where they have cognisance of the original matter, and an incident happens which is of temporal cognisance, or triable by the common law, they shall try the incident, but must try it as the common law would: thus in a suit for tithes, or for a legacy, if the defendant plead a release or payment; or in a suit to prove a will, if the defendant plead a revocation. So in the case at bar; they shall try the matter of payment or no payment; but then they must admit such proof as the common law would, or otherwise they reject the cause themselves, and ought to be prohibited. 3. A bare suggestion, that the defendant has but one witness, and that they take exceptions to his credit and reputation, is no cause of prohibition; for if they admit the proof of one witness, whether he be a credible witness or not they shall judge, and the party has no remedy but by appeal. 4. That it is not too late to come for a prohibition after sentence, for the sentence in this case is the grievance."

If the principal matter be of ecclesiastical cognisance, things depend-

Where the churchwardens libelled for a church rate, which was sentenced against them, and then they appealed to the metropolitan, but pending the appeal one of the appellants released to the appellee all actions, suits, and demands, but the other appellant proceeded in his and his partner's name to

(1) *Gould v. Gapper* (Clerk), 5 East, 345.

(2) 2 Salk. 547. *Breedon v. Gill*, 1 Ld. Raym. 220.

reverse the sentence; whereupon the appellee prayed a prohibition: it was adjudged that no prohibition lay, for the principal matter being of ecclesiastical cognisance, things dependent thereon will be so too; and whether this release will bar both the churchwardens is what the Spiritual Courts are to determine, and not the Court of King's Bench. (1)

A temporal loss, ensuing upon a spiritual sentence, is not of itself cause of prohibition. Thus in *Baker v. Rogers* (2), where the deprivation was for simony; it was urged, that in the Spiritual Court they ought not to have intermeddled to divest the freehold, which is in the incumbent after induction; but it was answered, that they did not meddle to alter the freehold, but they meddled only with the manner of obtaining the presentment, which by consequence divested the freehold from the presentee, by the dissolution of his estate, when his admission and institution was avoided. In like manner, where an incumbent (3) was libelled against in the Arches, for not being twenty-three years of age when made deacon, nor twenty-four when made priest, and he prayed a prohibition, because a temporal loss (namely deprivation) might follow; the Court denied the prohibition, and compared this case to that of "a drunkard, or ill liver, who are usually punished in the Ecclesiastical Courts, though a temporal loss may ensue; and if prohibitions should be granted in all cases where deprivation is the consequence of the crime, it would very much lessen the practice of those courts." (4)

In *Bluck v. Rackham* (5) the Court refused a prohibition because the suit was in form a civil proceeding; that the objections were in the nature of a special demurrer, and a matter of practice.

By stat. 1 & 2 Vict. c. 106. s. 32. a spiritual person absenting himself from his benefice without licence is to forfeit part of the annual value thereof, according to the period of his absence. By sect. 114. forfeitures are to be sued for in the Court of the bishop, by some person duly authorised by the bishop, and the payment enforced by monition and sequestration, and the bishop may direct the amount to be applied towards the improvement of the benefice. The decree in a suit instituted by the nominee of the bishop of Norwich in the Consistory Court for the forfeiture incurred under sect. 32. in the manner prescribed by sect. 114. stated, that the defendant was rector of the rectory and parish church of Walsoken, in the county of Norfolk and diocese of Norwich, and had been thereto rightfully and lawfully instituted and inducted; and declared that he had forfeited one-third of the annual value of his benefice, together with the expenses incurred by the nominee of the bishop, the amount thereof to be ascertained in the usual and accustomed manner by the registrar of the Court. The decree was confirmed, on appeal, in the Arches Court and in the Privy Council:—It was held, on motion for a prohibition, first, that the suit was in form a civil proceeding, and was not within the provisions of the Church Discipline Act. (6)

Secondly, that the allegation sufficiently showed the defendant to have cure of souls, but if not, the Court would not issue a prohibition at this

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ent thereon will be so too.

Temporal loss ensuing upon a spiritual sentence.

Deprivation of simony.

Deprivation of incumbent, for not being twenty-three years of age when made deacon.

Prohibition refused, because the suit was in form a civil proceeding, and the objections in the nature of a special demurrer, and a matter of practice.

Where prohibition will not be granted under stat. 1 & 2 Vict. c. 106.

(1) *Starkey v. Burton*, Yelv. 172. Cro. Jac. 234. *Gore v. Stark*, Noy, 129.

(2) Cro. Eliz. 789.

(3) *Roberts v. Pain*, 3 Mod. 67. 3 Burn's E. L. 390.

(4) *Vide* Gibson's Codex, 1020.

(5) 9 Jurist, 497.

(6) Stat. 3 & 4 Vict. c. 86.

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Judgment of Lord Denman in *Rackham v. Black*.

stage of the proceedings on an objection which was in the nature of a special demurrer.

Thirdly, that, inasmuch as, according to the practice of the Consistory Court, the registrar would report to the bishop, who would make order thereon, and the mode of ascertaining the value of one-third of the benefice was a matter of practice, the Court of Queen's Bench would not issue a prohibition; Lord Denman observing, "This was a suit in the Consistory Court of the Bishop of Norwich, to recover one-third of the profits of a benefice claimed from Mr. Black, on account of his non-residence therein. The sentence was against him in that court, and that sentence was confirmed on appeal in the Arches Court and in the Privy Council.

"The defendant now moves for a prohibition on three grounds: first, that this was a criminal proceeding within stat. 3 & 4 Vict. c. 86. s. 23., and that the conditions precedent for a criminal proceeding according to that statute were not fulfilled; secondly, that it did not sufficiently appear that Mr. Black held a benefice with cure of souls; thirdly, that the definitive sentence was illegal, because the bishop deputed the registrar to ascertain the amount of one-third of the annual value of the benefice, whereas he ought to have adjudicated thereon himself.

"As to the first ground, it appears that there are two kinds of proceeding in the Ecclesiastical Courts — civil and criminal; the one by a party interested, in form by libel, where the judgment is for his benefit, and is enforced by monition and sequestration. In form, this is a civil suit; the other is by any stranger, by promoting the office of judge by articles, and the judgment is for penal consequences against the defendant pro salute animæ and deprivation. This is a criminal suit; and the suit in question is, according to these tests, civil and not criminal. It is instituted not by any stranger, but by a party who may be said to have an interest, viz. by the nominee of the bishop, who is to recover money, which the bishop makes, by special order, direct to be laid out for the improvement of the benefice, the residence house, or any of the buildings (1), and who is in effect a trustee for this purpose: the proper mode of proceeding is decided by the tribunals, who are to decide on questions of procedure, to be by monition and libel, instead of citation and articles, and the decree is for a given amount of value, to be enforced by monition and sequestration only, and not for any penal consequences to be enforced by censure and deprivation.

"The course of legislation against non-residence indicates that it is a civil proceeding. The penalties given by stats. 21 Hen. 8. c. 13., 57 Geo. 3. c. 99., and 1 & 2 Vict. c. 106. s. 117. as against unbeneficed clerks, are all recoverable by civil proceeding in the courts of law. The action of debt for a penalty against a beneficed clerk is taken away, and this proceeding in the Ecclesiastical Courts is substituted by stat. 1 & 2 Vict. c. 106. s. 114, because ecclesiastical profits were to be taken and applied to ecclesiastical purposes, and a temporal court is not adapted for such a purpose; but though the tribunal is altered, the nature of the proceeding is the same. The condition required by stat. 3 & 4 Vict. c. 86., for a criminal proceeding against a clerk in holy orders, would be superfluous in respect of a charge of non-residence, as that is specific in its nature, and capable

(1) Stat. 1 & 2 Vict. c. 106. s. 114.

of easy ascertainment by the bishop, without the aid of a commission to inquire.

"Secondly, it is contended that the allegation 'that Mr. Bluck is rector of the rectory and parish church of Walsoken being rightfully and lawfully instituted and inducted thereto,' does not show him to have cure of souls. It is difficult to construe those words as not to include a cure of souls; but the objection has been considered in the appropriate tribunal for putting a construction on this form of pleading, and has been there overruled on the ground, that the words in question did allege a cure of souls; and certainly in this stage of the proceedings we ought not to issue our prohibition upon the footing of an objection, merely in the nature of a special demurrer.

"Thirdly, it is contended, that the definitive sentence is illegal in deputing the registrar to ascertain the value, instead of the bishop ascertaining it himself, and stating it in his sentence; but it has been answered in the Privy Council, that according to the practice of the Consistory Court, the registrar under this sentence would inquire and report to the bishop, and that the amount so ascertained by him would not be taken without the order of the bishop. The form of the decree directing the amount to be ascertained 'in the usual manner,' is consistent with this practice; and the affidavit on which the motion is founded prays a prohibition, lest the registrar should proceed to inquire and report to the bishop, and lest the bishop should proceed to enforce payment. The objection fails, both because it is founded on a mistake of facts, and because it relates to a rule of practice.

"The rule, therefore, must be discharged; and having been obtained after sentence in the Court below and the appellate courts, with costs." (1)

WHEN A PROHIBITION WILL AND WILL NOT BE GRANTED.

Judgment of Lord Denman in *Rackham v. Bluck*.

7. PROHIBITION AFTER SENTENCE—JUDGMENT—WRIT OF ERROR.

In the case of *Mendyke v. Stint* (2) it was agreed by the Court, 1. "That if any matter appears in the declaration, which sheweth that the cause of action did not arise *infra jurisdictionem*, there a prohibition may be granted at any time. 2. If the subject-matter in the declaration be not proper for the judgment and determination of such court, there also a prohibition may be granted at any time. 3. If the defendant, who intended to plead to the jurisdiction, is prevented by any artifice, as by giving a short day, or by the attorney's refusing to plead it, &c.; or if his plea be not accepted, or is overruled, in all these cases a prohibition likewise will lie at any time." (3)

In *Parker v. Clerk* (4) it was held, "It was never too late to move the King's Bench for a prohibition where the Spiritual Court had no original jurisdiction, as where a parish clerk sued the churchwardens for his salary due to him by custom, because the clerk of a parish is neither a spiritual

PROHIBITION AFTER SENTENCE—JUDGMENT—WRIT OF ERROR.

Resolutions of the Court in *Mendyke v. Stint*.

When a prohibition may be moved for at any time.

(1) *Rackham v. Bluck*, 11 Jurist, 325.;
vide etiam *Bluck v. Rackham*, 9 ibid. 497.
(2) 2 Mod. 271.

(3) *Darby v. Cosens (Clerk)*, 1 T. R. 525.
Leman v. Goulty, 3 ibid. 3.
(4) 6 Mod. 252. 3 Salk. 87.

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The Consistory Court of the bishop, the Court of Arches, and the Court of Delegates are superior courts, and defect of jurisdiction will not be presumed.

Deciding on churchwardens' accounts.

Charging a man to repair a church in respect of a lighthouse.

Pleading a modus.

person, nor is the duty in demand spiritual, for it is founded on a custom, and by consequence triable at law.

The Consistory Court of the bishop, the Court of Arches, and the Court of Delegates are superior courts; and after sentence, unless defect of jurisdiction be apparent on the proceedings therein, it will not be intended. (1)

Thus in *Hart v. Marsh (Clerk)* (2) it was held, that a prohibition did not lie after sentence, unless it appeared by the sentence that the Ecclesiastical Court had pronounced on matters conusable at common law, although there were several articles contained in the libel, some of which were so conusable; Mr. Justice Patteson observing, "It is laid down by several authorities, and not denied now, that after sentence, unless the want of jurisdiction be manifest, this Court will not interfere."

If it appear on the face of the proceedings, that the Ecclesiastical Court have decided on the propriety of churchwardens' accounts, a prohibition will be granted, because the Ecclesiastical Court has only authority to order churchwardens to deliver in their accounts. (3)

On a libel to charge a man to repair a church in respect of a lighthouse, a prohibition was granted after sentence, and an appeal to the delegates. (4)

If a man libel in the Spiritual Court for tithes in kind, and the defendant below suggests and insists upon a modus, there the Spiritual Court have no jurisdiction to try the modus, their method of trial of prescription being different from ours; but if a man libel for a modus, and the defendant admit the modus, the Spiritual Court may proceed in the cause. But even in the first case, if the party permit the Spiritual Court to proceed to sentence, he comes, then, too late for a prohibition, it being *pro defectu jurisdictionis* only; but a party can never be too late, where it is *pro defectu jurisdictionis*. (5)

Where a defendant in a tithe suit applied for a prohibition, on affidavit that he had answered on oath, or pleaded to the libel a modus, &c., it was objected, that the defendant had only put in an answer of a modus, and that his application was too soon, until he had regularly pleaded it; but the Court said the prohibition must be granted, as "it appeared there was nothing to try in the court below, but the modus insisted upon in the defendant's answer." (6)

Where the plaintiff in prohibition properly pleaded a modus to a suit for tithes in the Ecclesiastical Court of the dean of the cathedral church of Sarum, but the judge of the court by an interlocutory sentence decreed him to answer more fully, from which sentence he appealed, and his appeal was dismissed with costs, the Court of King's Bench granted a prohibition to both courts, in order to stay execution for the costs, for the sentence

(1) *Ricketts v. Bodenham*, 4 A. & E. 453. *Bodenham v. Ricketts*, 5 Dowl. P. C. 120.

Scmble, that on a motion for prohibition, as above, the Court will look only to the proceedings in the Ecclesiastical Court, and not to affidavits, for the purpose of ascertaining whether the validity of the rate was there questioned. Ibid.

(2) 5 A. & E. 591. 5 Dowl. P. C. 424.

(3) *Loman v. Goulty*, 3 T. R. 3. *Buggin v. Bennett*, 4 Burr. 2035. *Symes v. Symes*,

ibid. 813. 2 Ld. Ken. 538.; vide etiam *Argyle v. Hunt*, 1 Str. 187. *Blacquiére v. Harkins*, 1 Doug. 378. *Ladbroke v. Crichton*, 2 T. R. 649.

(4) *Rebow (Sir Isaac) v. Bickerton*, Bumb. 81.

(5) *Offley v. Whitchall*, ibid. 17. *Ex parte Williams*, 4 B. & C. 314. *Loman v. Goulty*, 3 T. R. 3.

(6) *French (Clerk) v. Trask*, 10 East, 348. 15 ibid. 574.

was not final ; and it also appeared on the face of the proceedings, that the jurisdiction of the Ecclesiastical Court ceased when the modus was pleaded, and could not re-commence till there was a verdict for the defendant, and a consultation awarded. (1)

In *York (Dean of) v. York (Archbishop of)* (2), where prohibition was granted after sentence, Lord Denman observed, "It was argued that nothing now remained which this Court could prohibit from being done, and not even a continuing court to which our writ could be addressed. These arguments, for obvious reasons, require to be narrowly watched, for they would give effect to unlawful proceedings merely because they were brought to a conclusion. But to the present case they are inapplicable. For on looking to the sentence we find that it admonishes the party not to exercise the functions of dean on pain of the greater excommunication ; and that the Court was adjourned only when this motion was made. The infliction of that pain would be the mode of enforcing the sentence, and this we may prohibit ; and we find in some of the entries that this Court has enjoined revocation of the sentence. The dean could not apply before sentence, for the sentence of deprivation is the only thing done which is beyond the jurisdiction of the archbishop. Up to that point he had unquestionably power ; for it was his duty to inquire with a view to ulterior proceedings ; and it seems that the lord chancellor discharged an application for a prohibition that had been made to him before sentence, on that very ground."

In *Paxton v. Knight* (3) the question was, whether a prohibition should be granted to stay proceedings in an Ecclesiastical Court, in a suit by a Quaker for a seat in a church, both parties founding their titles upon prescriptive rights. The Ecclesiastical Court determined against the Quaker ; upon which he applied for a prohibition, and it was granted to him, because there were reciprocal prescriptions alleged. That the prescriptive right of the one was determined for, though that of the other was determined against. And that the Ecclesiastical Court had, therefore, adjudged the adverse prescription to be a good one, which they could not try, as they established it upon less evidence than the common law required.

A prohibition cannot issue to a court-martial after its sentence has been ratified by the king and carried into execution. (4)

Although a prohibition will be granted either before or after sentence for want of original jurisdiction in the courts below, a prohibition will not be granted on account of defect of trial. For where a matter collateral and incidental to a suit arises, which is properly triable at common law as a modus, though the courts of common law would have granted a prohibition before sentence on account of the defect of trial in the Ecclesiastical Court, they will not grant it after sentence if the defendant pleaded the modus, and submitted to the trial of it, for by so doing he waived the benefit of a trial at common law (5) ; and to oust the Ecclesiastical Court of its jurisdiction it is not enough that a custom or prescription be stated,

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Dean of York's
case.

Where the sen-
tence is the
only thing done
which is be-
yond the juris-
diction of the
Court.

Quaker found-
ing his seat in a
church upon a
prescriptive
right.

When a
prohibition
cannot issue to
a court-martial.

When Spiritual
Court inciden-
tally determines
any matter of
common law.

Defectu
triationis.

Custom or pre-

(1) *Darby v. Cosens*, 1 T. R. 552. 3
Burn's E. L. 398.

(2) 2 Q. B. 40. *ante*, 997.

(3) 1 Burr. 314.

(4) *Rex v. Poe*, 5 B. & Ad. 681.

(5) *Full v. Hutchins (Clerk)*, 2 Cowp.
412. ; et vide *Stainbank v. Bradshaw*, 10 East,
349. n.

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scription must
be denied.

When the mat-
ter belongs to
the Spiritual
Court.

except it be denied by the other side, and the Court are proceeding to try it; for it may be immaterial to the question. (1)

Nor will a prohibition lie where the inferior court has only jurisdiction over part of the matter, and not of the rest. (2)

If by the proceedings in the cause it appear that the cognisance of the cause does not belong to the Spiritual Court, a prohibition will be granted after sentence; but if a person be sued out of his diocese, and he do not take advantage of it before sentence, he cannot have a prohibition after sentence, because the cause belongs to the Spiritual Court, and though it did not belong to that Spiritual Court, it belongs to some other, and not to the king's temporal court.

In *Dike v. Brown* (3), where the defendant libelled in the Spiritual Court for tithes of faggots made of loppings of trees; and the suggestion for a prohibition was, that these loppings were cut from the stumps of timber-trees above the growth of twenty years; but it was alleged, that sentence was given in the Spiritual Court, and therefore the plaintiff came too late for a prohibition; Chief Justice Holt said, "The sentence will not hinder the having a prohibition in any case, but in case of prohibitions grounded upon stat. 23 Hen. 8. c. 9., for citing out of the diocese. But because the plaintiff had not pleaded this matter in the Spiritual Court, they denied the prohibition, because the Spiritual Court has a general jurisdiction of tithes; and if any special matter deprive them of their jurisdiction, it must be pleaded there; and if it had been pleaded there, and issue joined upon it, and upon the trial it had been found not to be *silva cædua*, it had been well; but if they had refused to admit the plea, a prohibition should have been granted."

Stat. 14 Geo. 2.
c. 17.

Stat. 14 Geo. 2. c. 17. does not seem to extend to prohibitions, because the defendant may himself take down the record without a proviso. (4)

JUDGMENT.

If the defendant allow judgment to go by default, the plaintiff is entitled at common law to a writ of inquiry, and if the jury find damages he is entitled to costs under stat. 1 Gul. 4. c. 21. (5)

Writ of error.

No writ of error will lie upon the refusal of a prohibition; but when a consultation is awarded, it is with an *ideo consideratum est*, and then a writ of error will lie. (6)

Error does not lie from the King's Bench to the Exchequer Chamber, for prohibitions are not within stat. 27 Eliz. c. 28. (7)

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ACQUIRING THE
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8. MODE OF ACQUIRING THE WRIT OF PROHIBITION AND HEREIN OF THE PLEADINGS.

So long as the idea continued among the clergy, that the ecclesiastical state was wholly independent of the civil, great struggles were constantly

(1) *Dutens (Clerk) v. Robson*, 1 Hen. Black. 100.

(2) *Carlake v. Mapledoram*, 2 T. R. 473. *Gardner v. Booth*, 2 Salk. 548.

(3) 2 Ld. Raym. 835.

(4) 2 Archb. by Chitt. 1105.

(5) *Fide etiam* Bull. N. P. 331. 6 Bac. Abr. *Prohibition* (E), 576. 2 Tidd, 948.

(6) *St. David's (Bishop of) v. Lucy*, 1 Ld. Raym. 545.

(7) *Free (D.D.) v. Burgoyne*, 5 B. & C. 765. Vide *Jefferson v. Durham (Bishop of)*, 1 Bos. & Pul. 121. *Croucher v. Collins*, 1 Saund. 136. (1). *Jaques v. Cesar*, 2 ibid. 201. (1).

maintained between the temporal courts and the spiritual concerning the writ of prohibition and the proper objects of it; even from the time of the constitutions of Clarendon, made in opposition to the claims of Archbishop Becket in 10 Hen. 2., to the exhibition of certain articles of complaint to the king by Archbishop Bancroft in 3 Jac. 1. on behalf of the Ecclesiastical Courts. (1)

If a party be aggrieved in the Court below he can apply to the superior court, setting forth the nature and cause of his complaint, in being drawn ad aliud examen, by a jurisdiction or manner of process disallowed by the laws of the kingdom; and this used formerly to be done by filing, as of record, what was called a suggestion, containing a formal statement of the facts; but by stat. 1 Gul. 4. c. 21. s. 1. it is not necessary to file a suggestion on any application for a writ of prohibition, but such application may be made on affidavits only; and in case the party applying be directed to declare in prohibition before the writ issued, such declaration shall be expressed to be on behalf of such party only, and not, as heretofore, on the behalf of the party and of his majesty, and shall contain and set forth in a concise manner so much only of the proceeding in the court below as may be necessary to show the ground of the application, without alleging the delivery of a writ or any contempt, and shall conclude by praying that a writ of prohibition may issue; to which declaration the party defendant may demur, or plead such matters by way of traverse or otherwise, as may be proper to show that the writ ought not to issue; and conclude by praying that such writ may not issue; and judgment shall be given that the writ of prohibition do or do not issue, as justice may require.

The effect of stat. 1 Gul. 4. c. 21. has been to substantially place prohibitions, after a rule to declare has been obtained, upon the footing of an action; and in this respect it exhibits a close resemblance to a mandamus.

Formerly a prohibition could not be moved for on the last day of term; but it seems from stat. 1 Gul. 4. c. 21., that it can be moved for whenever a mandamus can be moved for.

The writ issues on the crown side of the Court of Queen's Bench only where the proceedings below are of a criminal nature, or have relation to matters of a criminal character, or in which the crown has interest or concern.

The affidavits should only be entitled "In the Queen's Bench."

The rule nisi is drawn up at the Crown Office, and served upon the parties whom it calls upon to show cause.

Where a rule nisi for a prohibition to an inferior court has been discharged, the Court will not allow the motion to be renewed, upon affidavits stating matter not before presented to the Court, but existing at the time of the original application. (2)

Upon motion to make the rule absolute, if the case require further argument, the Court will order the rule to be enlarged, giving the parties leave in the mean time to declare in prohibition; and the proceedings are then as in a cause on the plea side of the court, until an issue be tried; and the Crown Office rule is enlarged from term to term until the cause be tried.

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Stat. 1 Gul. 4.
c. 21. s. 1.

The effect of
stat. 1 Gul. 4.
c. 21. is to
place writs of
prohibition
upon nearly
the same foot-
ing as a writ of
mandamus.

Prohibitions
can be moved
for, whenever a
mandamus can
be moved for.

When the writ
issues on the
crown side of
the Court.

Where rule nisi
discharged
for insufficient
affidavits.

When parties
will be ordered
to declare in
prohibition.

(1) 3 Black. Com. by Stephen, 687.

(2) *Ricketts v. Bodenham*, 4 A. & E. 433.

**MODE OF
ACQUIRING THE
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HIBITION, AND
HEREIN OF THE
PLEADINGS.**

Party will not be ordered to declare, if the Court be clearly against the prohibition.

Testamentary appointment by a married woman under a doubtful power.
PLEAS.

It may be laid down generally, that the declaration in prohibition should be as precise and particular in the statement of the facts, as in an issue upon a return to a mandamus.

The declaration in prohibition should have a venue. (1)

If the cause of complaint be several, two persons cannot join in a declaration in prohibition. (2)

The Court will not put the party to declare in prohibition, if they are clearly of opinion against granting the prohibition, because the same application may be made to the other court. (3) In fact, leave to declare in prohibition is only granted where the Court inclines to prohibit, not where it inclines to the contrary. (4)

Upon an application for a prohibition to the Ecclesiastical Court, to prevent it from granting administration with the will annexed, in the case of a testamentary appointment by a married woman, under a doubtful power, the party was ordered to declare in prohibition. (5)

Pleas may now be pleaded to an action of prohibition. (6)

In a suit for tithes in the Ecclesiastical Court, if the defendant plead a plea, which raises a question beyond the jurisdiction of the Court, but afterwards waives it, the Court of Queen's Bench will not grant a prohibition in that stage of the proceedings. (7)

In a suit for subtraction of tithes in the Spiritual Court, by an impropriator, the defendant's personal answer stated a lease of them by plaintiff to a third party, by whom they were demanded, and also that they belonged to the vicar and not to the plaintiff. The defendant also put in a responsive allegation, that by immemorial usage, custom, and prescription, the tithes were deemed small or vicarial, and as such due to the vicar, and not to the plaintiff. The plaintiff's personal answer denied the usage as stated by the defendant, and the judge assigned a day to hear of the sufficiency of the plaintiff's answer, and term probatory to the defendant. It was held, that, in this stage of the cause, there was no issue in the lease; that the only matter in issue, viz. the immemorial right of the vicar, was properly cognisable by the Spiritual Court, and that there was no ground of prohibition. (8)

Pleading an issuable plea to articles in the Spiritual Court is no answer to a prohibition, if the spiritual judge have no jurisdiction over the matter of which he has taken cognisance. (9)

False suggestion.

Where an application was made for a prohibition, the Court did not compel the parties to take issue upon a suggestion, when upon examination it was found to be false. (10)

Refusal of a plea.

In *Statford v. Neale* (11) it was held, that the refusal of a plea was not traversable.

Issue may be

In actions of prohibition, wherein the defendant is considered as an actor,

(1) *Anger v. Brown*, 2 Show. 147. *Brogan v. Anger* (Clerk), Raym. (Sir T.), 387.

(2) *Kadurabider v. Bryan*, Cro. Car. 162.

(3) *Lindo v. Rodney*, 2 Doug. 613. n.

(4) *Itex v. Ely* (Bishop of), 1 Black. (Sir W.), 21. *In re York* (Dean of), 2 Q. B. 40.

(5) *Exp. Tucker in re Inman*, 1 M. & G. 229.

(6) *Hall v. Maule*, 5 N. & M. 455.

(7) *Cardew v. Colley*, 7 Dowl. P. C. 656.

(8) *Beauchamp* (Earl) *v. Turner*, 10 A. & E. 218.

(9) *Ex parte Williams*, 4 B. & C. 313.

(10) *Case of St. Mary Magdalen Bernandsey Church, in Southwark*, 2 Mod. 222.

(11) 1 Str. 482.

the issue may be made up and entered by the defendant as well as by the plaintiff (1); and the former may try the cause without proviso.

The trial by proviso cannot be had in civil actions, till there has been some laches or default in the plaintiff in not proceeding to trial, after issue joined, except where the defendant is considered as an actor, as in replevin, prohibition, and quare impedit, which are to have a return, consultation, and a writ to the bishop. (2)

In *Newson v. Bawldry* (3) the matter in dispute being ill-pleaded, the parties were directed by the Court to amend the plea.

In *Franklin v. Holmes* (4) after a nonsuit had been set aside in prohibition, the plaintiff had leave to amend the suggestion, which inadvertently alleged immemorial payment of tithes to the king and his predecessors, by inserting "and to such other person or persons as had or claimed title thereto."

A party being libelled in the Spiritual Court for non-payment of a church-rate, made in pursuance of a resolution of the vestry, objected to the libel, because it stated a notice to have been given, which was defective, and he obtained a rule nisi for prohibition: afterwards, the notice really given, which was good, and which had been lost, was discovered, and was submitted to the Court of Queen's Bench, on showing cause, with an affidavit, that by the practice of the Ecclesiastical Court (in the opinion of the deponent, a proctor) leave would be given to amend the libel by an additional article setting out the real notice: — It was held, that the rule nisi for a prohibition might be enlarged, to give an opportunity for such amendment. (5)

The spiritual courts have power to construe a statute the effect of which comes incidentally before them in the course of a proceeding where they have jurisdiction. Therefore, where, on objection taken to a declaration in prohibition on general demurrer, it appeared only that, in a proceeding to enforce a church rate, the Spiritual Court would have to determine the effect of an act of parliament, the Court of Queen's Bench gave judgment for the defendant in prohibition, on the ground that the Spiritual Court did not appear to have done anything as yet, and it was not to be presumed that they would construe the statute erroneously: and, under such circumstances, the Court of Queen's Bench would not give leave to amend for the purpose of raising the question in such court on the effect of the statute. (6)

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PLEADINGS.

made up and
entered by the
defendant as
well as by the
plaintiff, the
defendant
being consi-
dered an actor.

AMENDMENT.

Amendment
ordered by the
Court.

Amendment of
the suggestion
after a nonsuit
had been set
aside.

Amendment of
libel permitted
where a defec-
tive notice had
been inserted.

An erroneous
construction of
a statute will
not be pre-
sumed.

9. CONTEMPT OF THE WRIT OF PROHIBITION.

The disobeying of a prohibition is a contempt to the superior court that awards it, and punishable by attachment, which issues against the judge and party, though the writ of prohibition was not directed to the party (7), and proceeding after such prohibition subjects the parties to fine and

CONTEMPT OF
THE WRIT OF
PROHIBITION.

Disobeying a
prohibition is a
contempt.

(1) 2 Tidd, 734. 1 Archb. by Chitt.
348.

(2) R. & M. 22 in not. (a). 2 Tidd,
760. 2 Archb. by Chitt. 1100.

(3) 7 Mod. 69.

(4) Cit. 1 Tidd, 697.

(5) *Blunt v. Harwood*, 8 A. & E. 610.

(6) *Hall v. Maule*, 7 ibid. 721.

(7) 6 Bac. Abr. *Prohibition* (M), 600.
19 H. 6. 54.

**CONTEMPT OF
THE WRIT OF
PROHIBITION.**

Until a prohibition be superseded, a proceeding in a breach of it is a contempt.

**DAMAGES AND
COSTS.**

Stat. 1 Gul. 4.
c. 21.

COSTS.
By the common law there were no costs in prohibition.
Stat. 8 & 9
Gul. 3. c. 11.
s. 3.

Where a plaintiff acquired an

imprisonment, according to the discretion of the superior court. (1) And such attachment may even be awarded against a peer of the realm. (2)

In *Wainwright's case* (3) an attachment was granted upon affidavit, that the party proceeded after a prohibition delivered to him, in a suit for a seat in a church, which the plaintiff claimed by prescription; and upon his appearance and examination upon interrogatories he confessed the matter, and was fined five marks.

And not only an attachment lies for proceeding in the same cause pending a prohibition, but also for instituting a new suit for the same thing: thus, where a parson libelled for tithes, and a prohibition was brought, and he libelled for tithes of another year the first not being determined, an attachment was awarded. (4)

Whether a prohibition issue providently or improvidently, until it be superseded, a proceeding in breach of it, is a contempt. (5)

In an attachment upon a prohibition, the plaintiff can recover damages and costs against the party for proceeding after the writ of prohibition awarded. (6)

10. DAMAGES AND COSTS.

By stat. 1 Gul. 4. c. 21. "it shall be lawful for the jury to assess damages, for which judgment shall also be given; but such assessment shall not be necessary to entitle the plaintiff to costs."

Previously to the enactment of stat. 1 Gul. 4. c. 21. the issue in prohibition being a proceeding to inform the conscience of the Court, the jury, it seems, under stat. 8 & 9 Gul. 3. c. 11., could only award one shilling damages for the contempt on a verdict for the plaintiff (7); but it has been stated (8) that, after a plaintiff has had judgment, he might bring his action upon the case, and recover the damages he had sustained. (9)

By the common law there were no costs in prohibition. (10) Costs in prohibition depend upon stat. 8 & 9 Gul. 3. c. 11. s. 3. and stat. 1 Gul. 4. c. 21.

By stat. 8 & 9 Gul. 3. c. 11. s. 3. (11) "in suits upon prohibitions, the plaintiff obtaining judgment, or any award of execution, after plea pleaded, or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same."

Where a plaintiff acquired an absolute judgment in prohibition, though only upon a part, he was held under stat. 8 & 9 Gul. 3. c. 11. to be entitled to costs. Thus in *Middleton v. Croft* (12) the plaintiff in prohibition having

(1) F. N. B. 40. 6 Bac. Abr. *Prohibition* (M), 600.

(2) Ibid.

(3) Jones (Sir T.), 47.

(4) *Shurington v. Fleetwood*, Moore (Sir F.), 599. *Stafford's case*, 1 Leon. 111.

(5) 6 Bac. Abr. *Prohibition* (M), 600.

(6) *Facy v. Lange*, Cro. Car. 559. *Augier v. Brogan*, Jones (Sir T.), 128. *Auger v. Brewer*, 1 Vent. 348. *Heywood v. Foster*, 3 Lev. 360.

(7) *Pewtre v. Hurvey*, 1 B. & Ad. 154.

(8) 6 Bac. Abr. *Prohibition* (F), 579.

(9) *Carter v. Leeds*, Mich. 2 Geo. 2. cit. *ibid.*

(10) *Per Lord Tenterden in Free (D.D.) v. Lurgoyne*, 6 B. & C. 540.

(11) *Vide* Stephens' Ecclesiastical Statutes 666.

(12) 2 Str. 1062.

prevailed in one point, although he failed in all the rest, moved for costs ; and that they might be taxed from the time of the first motion. To which it was objected, that the point on which the plaintiff prevailed was not the gist of the proceedings, but only a circumstance ; and that it would be very hard, that they who had prevailed upon the merits should pay costs. But by the Court : " The words of the act are not to be got over, which give costs to the plaintiff if he obtains any judgment ; and this matter was under consideration in the House of Lords in *Dr. Bentley's case*, where the prohibition stood as to some articles, and there went a consultation for the rest : to be sure it will be considered in the quantum, but we cannot deny costs."

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absolute judgment in prohibition, though only upon a part, he was held under stat. 8 & 9 Gul. 3. c. 11. to be entitled to costs.

In *Haughton (Sir H.) v. Starkey* (1), after judgment for the plaintiff in prohibition, the question was, what costs ought to be allowed ; and it was doubted whether they should be computed from the first motion, or only from the declaration. Upon search, it was found to be the course of all the courts to tax only from the time of declaring, except in two instances : the one in the case of *Eads v. Jackson* (B. R. 2 Geo. 1.), and the other in the case of *Brown v. Turner* (C.B.), where they were allowed from the first motion. And of this opinion were all the judges. And the officers were directed for the future to allow the costs of the first motion.

Mode by which costs were to be computed.

In *Gegge v. Jones* (2), upon showing cause against a prohibition, the Court made the rule absolute, with a direction that the plaintiff should declare in prohibition. He tendered a declaration, but the defendant refused it, and applied to stay proceedings, as being willing to submit. The other insisted he had a right to go on, and so acquire the costs of the motion, which he could not otherwise have. But the Court stayed the proceedings without costs ; saying, the direction to declare was in favour of the defendant, who might waive it.

Plaintiff under stat. 8 & 9 Gul. 3. c. 11. could not have forced a defendant to accept process, if he were willing to submit, for the purpose of obtaining costs.

Where it was made a condition on enlarging a rule for a prohibition, that the party applying should declare, and he did declare, and the defendant, instead of pleading, obtained a judge's order for staying proceedings upon payment of costs incurred since the rule to declare ; it was held, upon motion to set aside that order, that the plaintiff in prohibition was not entitled to any further costs : Mr. Justice Littledale observing, " The stat. 8 & 9 Gul. 3. c. 11. s. 3. entitles a plaintiff to costs after plea pleaded or demurrer joined ; the plaintiff, therefore, is not entitled to costs under that statute. It is said, however, that if there had been judgment by default he might have recovered some damages, and then he would be entitled under the statute of Gloucester to costs. But here a jury could give no damages, because no proceedings were had after the prohibition issued, and therefore the defendant was guilty of no contempt." (3)

Costs not recoverable where a jury could give no damages.

Judgment of Mr. Justice Littledale in *Petress v. Harvey*.

Previously to stat. 1 Gul. 4. c. 21. it was held, that a prohibition took off the costs assessed upon an appeal, where the cause was returned to the inferior court. Thus, in *Crompton v. Waterford* (4), where an appeal had been to the delegates, who overruled it, and assessed costs for the wrong appeal, the Court agreed, that because a prohibition stays all proceedings,

A prohibition took off the costs assessed upon an appeal where the cause is returned to the inferior court.

(1) 1 Str. 82.

(2) 2 Ibid. 1149.

(3) *Petress v. Harvey*, 1 B. & Ad. 154.

(4) Hetl. 167. Lit. 365. Gibson's Codex, 1029.

DAMAGES AND COSTS.**Costs of a feme covert.**

the costs were taken away ; and added, that if the party was excommunicate, he should be absolved.

It has been resolved, that if a feme covert sue another in the Spiritual Court for incontinence with her husband, and recover costs, if the husband release them, the wife is barred ; for, since the husband is liable to the charges of the suit expended by the wife, he has a right to the costs in recompense ; besides, the wife cannot have a chattel interest exclusive of her husband. (1)

But, if the husband and wife be divorced a mensa et thoro, and the wife have alimony allowed her, and she sue for defamation or other injury, and recover costs, the husband cannot release them ; because they come instead of that which the wife has expended out of her alimony, which was a separate maintenance, and not in the power of the husband. (2)

Stat. 1 Gul. 4. c. 21. s. 1.

Stat. 1 Gul. 4. c. 21. s. 1. (3), after reciting that it was expedient to make some better provision for payment of costs in cases of prohibition ; enacts " that the party in whose favour judgment shall be given, whether on nonsuit, verdict, demurrer, or otherwise, shall be entitled to the costs attending the application and subsequent proceedings, and have judgment to recover the same."

The party in whose favour judgment is given in an action of prohibition, is entitled to the costs of the application for a writ of prohibition, without obtaining a rule for such costs. (4)

Executors seemingly comprehended in the provisions of stat. 1 Gul. 4. c. 21.

In *Scammell v. Wilkinson* (5) it was held, that under stat. 8 & 9 Gul. 3. c. 11. s. 3., no costs can be awarded on prohibition against executors, against whom judgment was obtained on demurrer, upon a question, whether they were entitled to a general or limited probate ; but it seems, that executors have been comprehended in the provisions of stat. 1 Gul. 4. c. 21.

Stat. 1 Gul. 4. c. 21. only applies to cases where there have been pleadings in prohibition.

Where a rule was made absolute for a prohibition, it was held that the costs of the rule could not be granted to the successful party under stat. 1 Gul. 4. c. 21. s. 1., because that statute only applied to cases where there had been pleadings in prohibition. (6)

But in case a verdict be given for the plaintiff, the jury may assess damages, but such assessment is not necessary to entitle the plaintiff to costs. (7)

Stat. 1 Gul. 4. c. 21. does not apply to costs incurred in the Ecclesiastical Court.

In *Tessimond v. Yardley* (8) it was holden, that stat. 1 Gul. 4. c. 21. did not enable the Court of Queen's Bench, where a party had declared in prohibition and succeeded, to grant him his costs incurred in the Ecclesiastical Court.

A judgment for prohibition as to some of the objects and purposes of the libel but not as to others, seems to have been a casus omissus out of stat. 8 & 9 Gul. 3. c. 11.

Where a writ of prohibition issues as to proceeding on part of the

Where the judgment on demurrer to a declaration in prohibition was, that a writ of prohibition issue as to a proceeding on part of the matters contained in the libel, with a view to a particular object, and a writ of consultation as to proceeding upon them for any other purpose, and as to all

(1) *Chamberlaine v. Hewson*, 5 Mod. 69. 1 Salk. 115. 12 Mod. 89.

(2) *Chamberlain v. Hewitson*, 1 Ld. Raym. 74.

(3) *Vide* Stephens' Ecclesiastical Statutes, 1442—1445.

(4) *Ex parte Tucker, in the matter of Inman*, 4 M. & G. 1079.

(5) 3 East, 202.

(6) *Rex v. Kealing*, 1 Dowl. P. C. 440.

(7) *Corner's Crown Practice*, 248.

(8) 5 B. & Ad. 458.

other matters in the libel; it was hesitatingly held, that this was not within stat. 8 & 9 Gul. 3. c. 11. (1)

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And there does not seem to be any provision made for such a case by stat. 1 Gul. 4. c. 21.; although it is provided that a jury may assess damages, yet it is also provided that "such assessment shall not be necessary to entitle the plaintiff to costs." (2)

matters contained in the libel.

Reg. Gen. H. T. 2 Gul. 4. (I.) 64., which directs that where a new trial is granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second, equally applies to issues in prohibition, even since stat. 1 Gul. 4. c. 21. s. 1. (3)

Reg. Gen. H. T. 2 Gul. 4. (I.) 64. applies to issues in prohibition.

Where an application was made that the costs incurred by fruitless attempts to obtain a prohibition might be included in the costs of proceedings for a church rate in the Ecclesiastical Court, and be paid before the person in contempt was discharged; the judge of the Consistorial Court of Rochester (4) refused the application. (5)

Where payment of costs incurred by fruitless attempts to obtain a prohibition will not be ordered.

PUBLIC WORSHIP. (6)

1. ESTABLISHMENT OF THE BOOK OF COMMON PRAYER, pp. 1076—1082.

Articles 20. & 34. Power of the church to decree rites and ceremonies — Of the traditions of the church — Extract from the charge of the Bishop of Worcester, relative to the forms in the ministration of divine service — Extract from the charge of the Bishop of Winchester as to postures and gestures — Extract from the charge of the Bishop of Lincoln respecting the origin of the Reformation in the Anglican Church — Canon 6. Impugners of the rites and ceremonies established in the Church of England censured — Liturgies before the Acts of Uniformity — Liturgies established by stat. 2 & 3 Edw. 6. c. 1. & stat. 5 & 6 Edw. 6. c. 1. s. 5. — Stat. 1 Eliz. c. 2. & stat. 13 & 14 Car. 2. c. 4. s. 24. — Statutes formerly made for uniformity of Common Prayer confirmed — Stat. 13 & 14 Car. 2. c. 4. s. 26. — True copies of the Book of Common Prayer to be provided in all churches — The rubric, or the directions of the Book of Common Prayer, form a part of the statute law of the realm — Stat. 2 & 3 Edw. 6. c. 1. & stat. 1 Eliz. c. 2. s. 4. — Penalties for using any other service than the Book of Common Prayer — Stat. 13 & 14 Car. 2. c. 4. s. 25. — Litanies relating to the sovereign, &c. can be changed — Offender not to be punished by the Temporal and Ecclesiastical Courts — Indictments when to be preferred — Archbishop or bishop can associate themselves with the justices of assize.

2. PERFORMANCE OF PUBLIC WORSHIP, pp. 1082—1100.

A clergyman, in the performance of divine worship, not at liberty to alter or omit any part of the service — Judgment of Sir John Nicholl in NEWBERRY v. GOODWIN — A clergyman has, in his own right, nothing whatever to do with the ordering the ornaments or furniture of the church — Judgment of the Bishop of Exeter IN RE PARKS SMITH (CLERK) — By the general law, the church service ought to be regularly performed every Sunday morning and evening — Incumbents of livings keeping curates, must read the church service once every month — Canon 14. The prescript form of divine service to be used on Sundays and holydays — Extracts from the charge of the Bishop of Hereford respecting the partial dissatisfaction which exists in the Anglican Church — Stat. 1 & 2 Vict. c. 106. ss. 80. 106. — Bishops may enforce two services on Sundays in certain cases —

(1) *Free (D. D.) v. Burgoyne*, 6 B. & C. 538.

(2) *Rogers' Eccles. Law*, 757.

(3) *Gracen v. Sanderson*, 7 A. & E. 897.

(4) (a).

(4) November, 1840

(5) 3 Burn's E. L. by Phillimore, 402.

(6) *Vide ante*, tit. BAPTISM — BRAWLING AND SMITING — BURIAL — CHURCH — LORD'S SUPPER — MARRIAGE.

No spiritual person to serve more than two benefices in one day — Stat. 2 & 3 Vict. c. 30. — When the bishop can order an apportionment of spiritual duties — Daily prayers — In what part of the church — What the priest shall explain — Homilies — Art. 35. — Canon 49. Ministers not allowed preachers, may not expound — Canon 46. Beneficed men, not preachers, to procure monthly sermons — Art. 24. In the public prayers of the church, and in the ministration of the sacraments, the English tongue to be used — Excepted instances — Stat. 5 Eliz. c. 28. s. 1. — The Bible and Book of Common Prayer to be translated into the Welsh tongue — Canon 58. Habit of the minister officiating — Stat. 1 Eliz. c. 2. s. 25. — Ornaments of the church and ministers — Morning and evening prayer — Psalter — Canon 15. Litany — Prayers and thanksgivings after the Litany — Extract from a charge of the Bishop of Lincoln relating to the provisions made by the Reformers, for the celebration of divine worship — Extract from the charge of the Bishop of Worcester deprecating restoration to obsolete usages — CHURCH MUSIC.

3. PUBLICATION OF MATTERS IN CHURCH, pp. 1100, 1101.

Stat. 7 Gul. 4. & 1 Vict. c. 45. — Notices not to be given in churches during divine service, &c. — Notices heretofore usually given during or after divine service, &c. to be affixed to the church doors — Decrees, &c. of Ecclesiastical Courts not to be read in churches — Clergymen not justified in reading a protest during divine service against the acts of their ecclesiastical superiors — Notices purely ecclesiastical — Clergyman during divine service cannot read a protest against the acts of his bishop.

4. DISTURBERS OF RELIGIOUS WORSHIP, pp. 1101, 1102.

How punished — Stat. 1 Gul. & M. c. 18. s. 18. — At common law, a person disturbing divine service, may be removed — Duty of churchwardens to preserve order and decorum in the church.

ESTABLISH- MENT OF THE BOOK OF COM- MON PRAYER.

Art. 20. Power of the church to decree rites and ceremonies.

Art. 34. Of the traditions of the church.

1. ESTABLISHMENT OF THE BOOK OF COMMON PRAYER.

Art. 20. "The church hath power to decree rites or ceremonies that are not contrary to God's word."

Art. 34. "It is not necessary that traditions and ceremonies (1) be in all places one, or utterly like; for at all times they have been diverse, and may

(1) *Traditions and ceremonies*:—As to the forms in the ministration of divine service, the Bishop of Worcester at his visitation in August, 1845, stated: "I cannot conclude this part of my subject without advert- ing briefly to the use of certain forms in the ministration of divine service, in themselves so unreasonable, as to owe their adoption (which happily has been confined to a small portion of this diocese) solely to their sup- posed antiquity. I allude especially to the practice of turning to the east, not only during the recital of the creeds, but even when the congregation are supposed to unite with their minister in the solemn duty of prayer. This is a practice unquestionably very ancient, but it may be doubted whe- ther antiquity can justify the observance of it, when it entails the inconvenience of the officiating clergyman turning his back upon the greater part of his congregation, while offering up prayers in which they are ex- pected to join. We have, indeed, the less reason to respect this ancient mode of wor- shipping towards the east, when we consi- der the fanciful and superstitious reasons which are assigned for it by some of the

fathers. Thus, Lactantius accounts for it by stating, 'that the east was more pecu- liarly ascribed to God, because He is the fountain of light and illuminator of all things; but the west is ascribed to that wicked and depraved spirit, the devil, be- cause he hides the light and induces dark- ness always upon man.' Tertullian, on the other hand, tells us 'that the east was the figure of Christ, and that, therefore, both their churches and prayers were turned that way.' Others maintain that such a prac- tice originated in the east having been the seat of Paradise, which we lost by the fall of the first Adam, and to which we hope to be restored through the second Adam, Christ our Saviour; while we are gravely told by another, that the east is the most honourable part of creation, and that we therefore turn to the east in time of prayer, as we sign with the right hand those who need consignation in the name of Christ, because the right hand is more honourable than the left hand. It is evident from these various modes of accounting for it, that the fathers themselves were at a loss how to as- sign a valid reason for a practice which cer-

be changed according to the diversity of countries, times, and men's manners; so that nothing be ordained against God's word. Whosoever through his private judgment willingly and purposely doth openly break the traditions and ceremonies of the church, which be not repugnant to the word of God, and be ordained and approved by common authority, ought to be rebuked openly (that others may fear to do the like), as he that offendeth against the common order of the church, and hurteth the authority of the magistrate, and woundeth the consciences of the weak brethren. Every particular or national church, hath authority to ordain, change, and abolish ceremonies or rites of the church, ordained only by man's authority; so that all things be done to edifying."

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MON PRAYER.

Canon 6. "Whosoever shall hereafter affirm that the rites and ceremonies of the Church of England, by law established, are wicked, anti-christian, or superstitious; or such as, being commanded by lawful authority, men, who are zealously and godly affected may not with any good conscience approve them, use them, or, as occasion requireth, subscribe unto them: let him be excommunicated *ipso facto*, and not restored until he repent, and publicly revoke such his wicked errors."

Canon 6.
Impugners of
the rites and
ceremonies
established in
the Church of
England
censured.

In the early ages of the church, every bishop had a power to form a liturgy for his own diocese; and if he kept to the analogy of faith and

Liturgies be-
fore the Acts of
Uniformity.

tainly could derive no sanction from the authority of the holy scriptures. These, on the contrary, abound in representations of the universality of the divine presence, 'whose way is in the sea, whose path in the great waters, and whose footsteps are not known.' I am, indeed, much inclined to believe that this practice of antiquity, like many others adopted by the primitive church, owed its origin to the too ready admission into the Christian service of forms and ceremonies belonging to pagan superstition, which we have already been considering. It is, indeed, a curious coincidence, that as the ancient Greeks were in the habit of turning their faces towards the east when they prayed to their gods, and to the west when they prayed to their heroes or demigods (1 Potter's Antiquities, 241.), who were always supposed by the first Christians to have been men under the influence of demoniacal possession, so in the primitive church we find that when catechumens were admitted by baptism into membership with Christ, they were directed in the first instance to renounce Satan by stretching out their hands against him towards the west, and afterwards turn towards the east, as towards the Saviour, whose servants they now professed to have become. In like manner, there is every reason to believe that the practice of building our churches east and west, was adopted from a similar practice having prevailed in the erection of heathen temples. We learn from Montfaucon, that the statue of the god to whom any temple was dedicated, was always placed looking towards the west, in order that the worshipper, in addressing his prayers to it, might be turned towards the east; and as the statue was placed opposite

to the entrance of the temple, it followed that such entrance must have been towards the west, and the more sacred part of the edifice towards the east. These are matters curious and interesting to the antiquary, but originating, as they probably do, in notions connected with heathen superstition, they are not such as should command our respect, or be considered as essential in our forms of divine worship."

Respecting postures and gestures, the Bishop of Winchester, in his charge at the visitation of 1845, observed: "The postures and gestures which you use in your ministrations are matters of indifference, simply considered. Yet hear one of our divines. 'It was a long and general custom in the church, upon all occasions and motions of solemnity or greater action, to make the sign of the cross in the air, on the breast, or on the forehead; but he that in England should do so upon pretence, because it was a Catholic custom, would be ridiculous.' (Taylor, Rule of Conscience, book iii. c. 4. rule 15.) He would be worse than ridiculous, he would be an object of just jealousy and suspicion, and a stumbling-block. That was a wise saying of one of our own reformers, 'Albeit I know and confess that gestures of themselves be indifferent, yet I would wish all such gestures to be avoided as have outwardly any appearance of evil, according to the saying of St. Paul, 'Abstain from all appearance of evil.' (1 Thess. v. 22. Becon's Catechism, Parker edition, p. 298.) And this is the very spirit of our church, when 'to take away all scruple concerning the use of the cross in baptism,' she refers, in a particular rubric for the true explication thereof and the just reasons for the retaining of it, to the 30th canon."

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MENT OF THE
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MON PRAYER.

doctrine, all circumstances were left to his own discretion. After practice was, for the whole province to follow the service of the litan church; which also became the general rule of the church. Lyndwood acknowledges to be the common law of the church; mates that the use of several services in the same province (as in was not to be warranted but by long custom. (1)

The Latin services, as they had been used in England before, in King Henry the Eighth's (2) reign without any alteration, excasures of collects for the pope, and for the office of Thomas Beck

(1) Gibson's Codex, 259.

(2) *King Henry the Eighth*: — The Bishop of Lincoln, in his charge at the triennial visitation in 1846, said: — "It suits the purpose of our adversaries to represent Henry VIII. as the author of our Reformation. They seek to cast discredit upon it by connecting it with his vices and crimes. But, if by reformation are meant the removal of the corruptions which had been introduced into the doctrines and services of the church, and the re-establishment of the faith once delivered to the saints in its primitive integrity and purity, Henry VIII. (Cardwell, Preface to the two Liturgies of Edward VI. p. 6.) can lay little claim to the title of a reformer. Some abuses had been corrected, some superstitious practices exposed and abolished; but in respect of its doctrine and ritual the church in this country, though emancipated from the yoke of the Bishop of Rome, was at the decease of Henry VIII. still Romish. But, though he cannot with propriety be called the author of the Reformation in this country, he acted as a pioneer (see the preface to Burnet's History of the Reformation) to the reformers; he removed obstacles out of the way, and sanctioned measures which were necessary preliminaries to reformation. He abolished the papal power in this country, refusing to recognise that pretension, which, perhaps, of all the papal pretensions, derives the least support either from scripture or tradition — that the Bishop of Rome possesses of divine right a spiritual supremacy over the church of Christ. He asserted, or rather re-asserted, the right of every national church to proceed, without awaiting for the concurrence or co-operation of any other branch of the Catholic church, to inquire into and remove corruptions either in doctrine or in worship. He dissolved the monastic bodies, the most efficient instruments employed by the Bishop of Rome to carry out his schemes of spiritual and temporal aggrandisement. Entirely dependent on him, and acting on the conviction that his decrees absolved them from the bond of allegiance to the sovereign, and cancelled the obligation of obedience to the laws, they formed in every country a well-disciplined army, blindly devoted to his interests, and ready at any cost or hazard to execute his mandates. Their dissolution,

therefore, was essential to the extinction of the papal supremacy. measures by which Henry effectually prepared the way for reformation, were the encouragement given to the translation of the scriptures into the English language; the order which he issued for placing copies of the scriptures thus translated, in churches; and the commission (1 Burnet, Hist. of the Reformation, 540.) which he gave to laymen to keep copies in their houses. These measures may be reasonably entertained as the work which Henry foresaw the consequences of. But this is certain; in introducing these measures, he contrived effectually to pave the way for the Reformation.

Such was the position in which the church stood at Henry VIII. He had paved the way for reformation, but had done comparatively little of the way of actual reform. That which was left to be accomplished by his successors, whose reign, short though it was, was of the constitution of the church. He subjected to a searching scrutiny the liturgy which was composed; articles were framed, declaring the doctrine of the church on all fundamental points; measures were taken towards compiling a new code of ecclesiastical law. Much also was done towards the correction of abuses, and the abolition of superstitious practices. The work which had been thus begun, and auspiciously begun, was interrupted by the death of the youthful monarch, and the succession of Mary, who took measures for bringing the kingdom under subjection to the Bishop of Rome, and undoing all that had been done in the work of reformation. If her reign had been prolonged, there is too much reason to think that the Reformation would have been crushed in England, as it was in other countries, by the strong hand of the papacy. She, however, was removed after a short reign, and her successor, whose long reign was one of the brightest periods in the history of our country, took up the work which had been left by Edward VI., and went on to bring it to completion."

some other saints, whose days were, by the king's injunctions, no more to be observed; but those rasures or deletions were so few, that the old mass books, breviaries, and other rituals served without new impressions. And Queen Mary having called in and destroyed the rased books, required all parishes to furnish themselves with new ones, and that the service should stand as it was most commonly used in the last year of Henry VIII. (1)

In the second year of Edward the Sixth, a liturgy was established by stat. 2 & 3 Edw. 6. c. 1.; but as some things were contained in it which embraced the superstition of those times, and as some other exceptions were taken to it, it was reviewed, and alterations were made in it, which consisted in adding the general confession and absolution, and the communion to begin with the Ten Commandments. The use of oil in confirmation and extreme unction were left out, and also prayers for souls departed, and that which tended to a belief of Christ's real presence in the eucharist. And this liturgy, so reformed, was established by stat. 5 & 6 Edw. 6. c. 1. s. 5. as follows:—"Because there hath risen in the use and exercise of common service in the church heretofore set forth, divers doubts for the fashion and manner of the ministration of the same, rather by the curiosity of the minister and mistakers, than of any other worthy cause: therefore, as well for the more plain and manifest explanation hereof, as for the more perfection of the said order of common service," ... "the king, with the assent of the lords and commons, hath caused the foresaid order of common service, intituled 'The Book of Common Prayer,' to be faithfully and godly perused, explained, and made fully perfect, and hath annexed and joined it, so explained and perfected, to this statute; adding also, a form and manner of making and consecrating of archbishops, bishops, priests, and deacons, to be of like force, authority, and value as the same like foresaid book, entitled the Book of Common Prayer, was before; and to be accepted" ... "with the same clauses of provisions and exceptions to all intents, constructions, and purposes as by stat. 2 & 3 Edw. 6. c. 1. was limited and expressed and appointed for the uniformity of service and administration of the sacraments throughout the realm, upon such several pains as in the said act is expressed. And the said former act to stand in full force and strength to all intents and constructions, and to be applied, practised, and put in use, to and for the establishing of the Book of Common Prayer now explained and hereunto annexed, and also the said form of making archbishops, bishops, priests, and deacons, hereunto annexed, as it was for the former book."

A liturgy was likewise established by stat. 1 Eliz. c. 2. (2) But the regulations made by the several Acts of Uniformity for the establishing of the several respective liturgies, are enforced by stat. 13 & 14 Car. 2. c. 4. s. 24., by which it was enacted, that "the several good laws and statutes of the realm which have been formerly made, and are now in force, for the uniformity of prayer and administration of the sacraments, shall stand in full force and strength to all intents and purposes whatsoever, for the establishing and confirming of the said book hereinbefore mentioned, to

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MENT OF THE
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MON PRAYER

Liturgies estab-
lished by
stat. 2 & 3
Edw. 6. c. 1.
& stat. 5 & 6
Edw. 6. c. 1.

Stat. 1 Eliz.
c. 2.

Stat. 13 & 14
Car. 2. c. 4.
s. 24.

Statutes
formerly made
for uniformity
of Common
Prayer
confirmed.

(1) Stat. 1 Mar. sess. 2. c. 2. s. 3. Gib-
son's Codex, 259.

(2) *Vide* Stephens' Ecclesiastical Statutes,
364—370. in not.

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MENT OF THE
BOOK OF COM-
MON PRAYER.**

Stat. 13 & 14
Car. 2. c. 4. s. 26.
True copies of
the Book of
Common
Prayer to be
provided in all
churches.

The rubric, or
the directions
of the Book of
Common
Prayer, form a
part of the
statute law of
the realm.

Uniformity.
Stat. 2 & 3
Edw. 6. c. 1.
& stat. 1 Eliz.
c. 2. ss. 4 & 5.
Penalties for
using any other
service than the
Book of Com-
mon Prayer.

be joined and annexed to this act, and shall be applied, practised, and put in use for the punishing of all offences contrary to the said laws, with relation to the book aforesaid, and no other."

By stat. 13 & 14 Car. 2. c. 4. s. 26. a true printed copy of the Book of Common Prayer and administration of the sacraments, and other rites and ceremonies of the church, according to the use of the Church of England, together with the psalter or psalms of David, pointed as they are to be said or sung in churches, and the form and manner of making, ordaining, and consecrating of bishops, priests, and deacons, shall, at the costs and charges of the parishioners of every parish church and chapelry, cathedral church, college, and hall, be attained and gotten upon pain of forfeiture of 3*l.* by the month, for so long a time as they shall be unprovided thereof.

In *Kemp v. Wickes* (1) Sir John Nicholl observed, "The Book of Common Prayer, and therefore the rubric contained in the Book of Common Prayer, has been confirmed by parliament. Anciently, and before the Reformation, various liturgies were used in this country; and it should seem as if each bishop might in his own particular diocese direct the form in which the public service was to be performed; but after the Reformation, in the reigns of Edward the Sixth and Queen Elizabeth, acts of uniformity passed, and those acts of uniformity established a particular liturgy to be used throughout the kingdom. King James the First made some alteration in the liturgy; particularly, as it will be necessary to notice, in this matter of baptism. Immediately upon the Restoration, the Book of Common Prayer was revised. An attempt was then made to render it satisfactory, both to the church itself and to those who dissented from the church, particularly to the Presbyterians; and for that purpose conferences were held at the Savoy: but the other party requiring an entire new liturgy on an entire new plan, the conference broke up without success. The liturgy was then revised by the two houses of convocation; it was approved by the king; it was presented to the parliament, and an act passed confirming it in the 13 & 14 Car. 2., being the last act which has passed upon the subject; and so it stands confirmed to this day, except so far as any alteration may have been produced by the Toleration Act, or by any subsequent statutes.

"The rubric, then, or the directions of the Book of Common Prayer, form a part of the statute law of the land."

By stat. 2 & 3 Edw. 6. c. 1. (2) & stat. 1 Eliz. c. 2. ss. 4 & 5. (3), if any parson, vicar, or other whatsoever minister, that ought to sing or say common prayer, or minister the sacraments, refuse to use or minister the same in such order and form as set forth in the Book of Common Prayer; or shall wilfully and obstinately use any other rite, ceremony, form, &c. of celebrating the Lord's Supper or other open prayers; or shall preach or speak anything in the derogation of the said book, or anything therein contained, and be thereof convicted, either by verdict of twelve men, by his own confession, or by notorious evidence of the fact, he shall forfeit, if the prosecution be upon stat. 2 & 3 Edw. 6. c. 1., for his first offence, the profit of such a one of his spiritual benefices as it shall please the king to appoint, and also be imprisoned six months; and for the second offence, be imprisoned for a year, and be

(1) 3 Phil. 268.

(2) *Vide* Stephens' Ecclesiastical Statutes,

310. *in not.*

(3) *Ibid.* 365, *in not.*

deprived of all his spiritual functions; and for the third offence, be imprisoned for life. If he shall not have any spiritual promotion, he shall, for the first offence, be imprisoned six months, and for the second, be imprisoned for life. If the prosecution be under stat. 1 Eliz. c. 2. then, for the first offence, he shall forfeit to the king the profit of all his spiritual promotions for one year, and be imprisoned six months; for the second offence be imprisoned for a year, and deprived of all his spiritual promotions; and for the third offence, be deprived of all his spiritual promotions, and be imprisoned for life; and if he have no spiritual promotion, then, for the first offence, imprisonment for a year; for the second, imprisonment for life.

ESTABLISH-
MENT OF THE
BOOK OF CO-
MON PRAYER

A person of the name of Flemming was indicted (1) upon stat. 1 Eliz. c. 2., and punished under its provisions, because he had given the sacrament of baptism in a different form to that, which was prescribed. In *Rex v. Sparks* (2), an indictment for using alias preces in the church, and alio modo, seems to have been judged insufficient, because such prayers may be used upon some extraordinary occasion, and consequently no crime: and it was said, that the indictment ought to have alleged, that the defendant used other forms and prayers, instead of those enjoined, which were neglected by him; for otherwise every parson may be indicted, who used prayers before his sermon, other than such as are required by the Book of Common Prayer.

Construction
of the words
"Any other
rite."

In the 31st of Eliz., Robert Caudrey (Clerk) (3) was deprived of his benefice before the high commissioners, for having preached against the Book of Common Prayer, and for having refused to celebrate divine service according to its directions; which deprivation, though not prescribed by stat. 1 Eliz. c. 2. for the first offence, was declared to be good, because the ecclesiastical judge could inflict such sentence before the making of that statute, and was not inhibited by its enactments; on the contrary, his ancient power is reserved.

Ecclesiastical
judge not in-
hibited by
stat. 1 Eliz.
c. 2.

A clerk was indicted upon stat. 1 Eliz. c. 2. at the quarter sessions, for using alias preces, &c. and was fined 100 marks, and it was held by the whole court to be ill; because, though the justices of peace were supposed to have power in their sessions to inquire into this matter, yet they could inflict no other punishment than that which is directed by the statute. (4)

Although an offender under stat. 1 Eliz. c. 2., after the first offence, commit another, and after the second, many more; yet he cannot be deprived for any of the latter offences, unless judicially convicted (5); so as the second offence, for which he must be deprived, must be committed after such judicial and solemn conviction and punishment (and also the second indictment ought to make mention of the first indictment; especially, if the second be before other justices). Upon this doctrine, when one was indicted "pro auditu trium privatar' missar' tribus seperalibus diebus," and that upon several indictments, and found guilty upon all three; he was only fined 100 marks for the first. (6)

A clerk can
be deprived
before judic-
conviction.

The power given to the patron under stat. 1 Eliz. c. 2. s. 5. implies an immediate voidance, without declaration; especially if interpreted according

The power
given to the
patron under
stat. 1 Eliz.
c. 2. s. 5.
implies an
immediate
voidance.

(1) 1 Leon. 295. Vide *Anon.* Godb. 119.

(2) 3 Mod. 79.

(3) 5 Co. 1. (a). Vide *Candict and Plo-*
mer's case, Godb. 162.

(4) *Rex v. Sparks*, 3 Mod. 79.

(5) *Caudrey's case*, 5 Co. 1. (a). 2 Inst.
479.

(6) *Dyer*, 323. (b).

ESTABLISHMENT OF THE BOOK OF COMMON PRAYER.

Feme covert within stat. 1 Eliz. c. 2.

Those who hear prayers maintain them.

Imprisonment stands in lieu of the forfeiture.

Stat. 13 & 14 Car. 2. c. 4. s. 25. Litanies relating to the sovereign, &c. can be changed.

Offender not to be punished by the Temporal and the Ecclesiastical Courts.

Indictments, when to be preferred.

Archbishop or bishop can associate themselves with the justices of assize.

PERFORMANCE OF PUBLIC WORSHIP.

A clergyman in the performance of divine worship.

to the judgments given upon stat. 13 Eliz. c. 12. in case of deprivation for not subscribing the articles. (1)

A feme-covert is within stat. 1 Eliz. c. 2.: thus, where the wife, &c. was indicted with the husband and priest; "et habuerunt separalia judicia sua, scilicet, quilibet foris — faceret 100 marcas dominæ reginæ." The like is also mentioned in *Moore v. Hussey* (2) as an uncontested point. (3)

Where the indictment was for the saying and hearing of mass; the tenour thereof, with reference to the hearers, was, "Fuerunt præsentes, audientes missam prædictam, ac manutinent' et confortant' prædicti J. R. [the priest] ad missam prædictam dicend' et celebrand';" it was held, that the indictment was good, not only against him who said mass, but also against those "queux oyent et mainteigne le dit masse;" implying, that to hear, is to maintain. (4)

Where Sir Edward Walgrave (5) refused to pay the 100 marks, and was imprisoned, but died within the six months, Chief Baron Saunders desired to be informed by the justices of the Queen's Bench, whether his executors were obliged to pay the 100 marks; it does not appear, what the answer was, but the circumstance with which he puts it, seems to determine it in favour of the executors, viz. that it was by the act of God, that his body could not sustain the imprisonment of the six months, which he chose in lieu of the forfeiture.

In litanies, &c. relating to the sovereign, &c. it has been provided by stat. 13 & 14 Car. 2. c. 4. s. 25. that in all those prayers, litanies, and collects which do any way relate to the king, queen, or royal progeny, the names be altered and changed from time to time, and fitted to the present occasion, according to the direction of lawful authority, i. e. (according to practice) of the king or queen in council.

In the saving of all ecclesiastical jurisdictions for the trial and punishment of the foregoing offences, it is provided, that those tried and punished by the ordinary shall not again be tried for the same by the justices, nor shall those tried by the justices be again tried for the same by the ordinary. (6)

Indictments upon the foregoing statutes must be preferred at the assizes next after the committing the offence.

Justices of assize can try and sentence persons indicted as in cases of indictments for trespass, provided that every archbishop and bishop can, at his pleasure, associate himself to such justices for the inquiring of, hearing, and determining the same.

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A clergyman in the performance of divine worship, is not at liberty to alter or omit any part of the service; and if he do, the Ecclesiastical Court can punish him by admonition (7); thus, in the office of judge promoted by *Newbery v. Goodwin* (8), Sir John Nicholl observed, "This is a suit against

(1) *Vide* stat. 13 Eliz. c. 12. Stephens' Ecclesiastical Statutes, 412. *Baker v. Brent*, Cro. Eliz. 679.

(2) Hob. 97.

(3) Dyer, 323. (b). *Vide etiam Rex v. Foster* (D.D.), 1 Rol. 93.

(4) Dyer, 303. (a), (b).

(5) Ibid. 231. (b).

(6) Stat. 1 Eliz. c. 2. s. 24.

(7) *Caudrey's case*, 5 Co. 1. 2 Rol. Abr. Prerogative le Roy (R), 222. pl. 5.

(8) 1 Phil. 282.

a clergyman for irregularities in reading the holy scriptures, — and for quarrelling, chiding, and brawling in the church.

“The usual proceedings have been had, and the articles containing the circumstances of the charge stand for admission.

“The first two articles plead the law upon the subject, — the canons and the statute.

“The law directs that a clergyman is not to diminish in any respect, or to add to the prescribed form of worship; uniformity in this respect is one of the leading and distinguishing principles of the Church of England, — nothing is left to the discretion and fancy of the individual. If every minister were to alter, omit, or add according to his own taste, this uniformity would soon be destroyed, and though the alteration might begin with little things, yet it would soon extend itself to more important changes in the public worship of the established church, and even in the scriptures themselves; — the most important passages might be materially altered, under the notion of giving a more correct version, — or omitted altogether, as unauthorised interpolations.

“The law, also, not merely the statute of Edward VI., but the general ecclesiastical law, protects the sanctity of public worship, — and still more endeavours to prevent every circumstance which may lead to the disturbance of persons engaged in solemn acts of devotion; it prohibits all quarrelling, chiding, and brawling in the church or churchyard, and requires decent and orderly behaviour.

“The third article pleads generally, that the defendant frequently leaves out portions of the holy scriptures appointed to be read; and often acknowledges that he has so done; and declares that he will do so again.

“The fourth article pleads a specific instance, viz. ‘that on the preceding Sunday he omitted part of a verse in the first lesson;’ and if the fact had happened simply (though, strictly speaking, not legally justifiable to omit any part), yet, probably, this suit would not have been brought: but the article proceeds to state, that after he had omitted the verse, he looked round to the pew of Francis Newbery, and said, ‘I have been accused by some ill-natured neighbour of making alterations in the service; I have done so now, and shall do so again, whenever I think it necessary; therefore mark.’

“This gives a very different colour and complexion to the act, — the omission seems to have been made, not from mere feelings of delicacy, which, though not a legal justification, would greatly extenuate the omission; but the omission seems to have been selected, as affording a favourable opportunity of asserting the general right, and even of reflecting, in the midst of the service, upon those who questioned the general right.

“The violation, therefore, of the law, was aggravated by circumstances which render the correction of the offence necessary and proper.

“If this article should be proved, it will not only subject the party to admonition, but further, to the payment of costs.”

A clergyman has, in his own right, nothing whatever to do with the ordering the ornaments or furniture of the church. Thus, *In re Parks Smith (Clerk)*, the Bishop of Exeter (28th May, 1847) pronounced the following judgment: —

“This is a criminal proceeding instituted by me, on my own mere motion, against the Rev. William George Parks Smith, minister of the

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liberty to alter
or omit any
part of the
service.

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Sir John
Nicholl in
*Newbery v.
Goodwin.*

A clergyman
has, in his own
right, nothing
whatever to do
with the order-
ing the orna-
ments or furni-
-f the

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(*Clerk*).

chapel of Saint John, in the parish of Tormoham, in this diocese, for placing, or causing to be placed, and suffering to remain during the performance of divine service, on Easter day of this year, in various parts of the said chapel, and especially on the communion table, certain ornaments, or other unauthorised things, being ‘against the laws ecclesiastical.’

“ I directed a commission of inquiry into the foregoing charges against Mr. Smith, to be issued in conformity to stat. 3 & 4 Vict. c. 86.; and the commissioners reported, that there was a sufficient *prima facie* ground for instituting proceedings against the accused. Upon which, Mr. Smith admitted in writing the truth of the charges which were the subject of that commission of inquiry, and has consented that I shall pronounce, without any further proceedings, such sentence as I shall think fit.

“ Under ordinary circumstances, I should not have instituted criminal proceedings against a clergyman, for any act, the unlawfulness of which he did not himself know; but should rather have been content to give him a private intimation of the fault which he had committed.

“ But, in the present instance, there were, unfortunately, considerations which compelled me to have recourse to a more public proceeding. The offence was committed under my own eye, in the chapel in which I am, and for several years have been, in the habit of bearing part in the services therein performed. Therefore, if some public notice were not taken of it by me, the reasonable inference would be, that I was not only cognisant of the act, but that I approved it; and yet it has partly appeared in evidence, and it is well known to Mr. Smith, that I have again and again entreated and enjoined him to abstain from all change, in matters not required by the rubric or other law of the church; that the act, therefore, which is now charged against him, as an offence, was only the last of a series of indulgences of his own thirst of novelty, with whatever disregard of the expressed judgment of his bishop, and at whatever hazard to the peace of his congregation.

“ The ornaments placed by Mr. Smith, or by others, under his permission, on the communion table, prepared for the administration of the Lord's Supper on Easter day last, were two glass vases containing flowers, and a cross about two feet high, decked with flowers. Was it unlawful for him to do this?

“ In answering this question, it is first necessary to remark, that Mr. Smith had, in his own right, nothing whatever to do with the ordering of the ornaments or furniture of the church.

“ This is a matter which belongs to the churchwardens, where there are such officers; and where there are none, as in this chapel of Saint John's, to those to whom it may have been, by proper authority, confided: to the minister's opinion, indeed, and to his wishes, in all lawful things, great deference ought to be, and doubtless will always be, shown. But, if he assume a right which does not belong to him; if he permit himself to step beyond the line of his own duty, and to intrude on the province of others, it becomes him to be cautious, to the utmost, against venturing on any act which, in itself, is even questionable.

“ Now, would it be lawful for any persons whomsoever, even for those officers to whose care the ornaments of the church are especially committed;

would it be lawful for them, to deck the Lord's table, in preparation for the holy communion, with vases containing flowers, and with a cross placed on the table for the occasion? Certainly not; unless there be an express or implied direction so to do. It is not enough, that there be no express prohibition. The very nature of the case, the general requisition of uniformity, and the positive enactment, 'that no form or order of common prayer, administration of sacraments, rites or ceremonies, shall be openly used, other than what is prescribed and appointed to be used,' all alike lead to the same conclusion, that it is not lawful for any person whomsoever, to introduce novel ornaments, at his own discretion. In truth, where would the claims of such discretion end?

"If one person may, at his pleasure, decorate the Lord's table with a cross, another may equally claim to set a crucifix upon it, whilst a third might think it necessary to erect some symbol of puritan doctrine or feeling to mark his reprobation of his Romanising neighbour.

"There is, indeed, one important order in the Book of Common Prayer, as it is settled by the last Act of Uniformity, and as it was enacted also by the similar statute of the 1st Eliz. c. 2. 'that such ornaments of the church, and of the ministers thereof, at all times of their ministrations, shall be retained, and be in use, as were in this Church of England, by the authority of parliament, in the second year of the reign of King Edward VI.'

"Now, were vases containing flowers and the cross decorated with flowers on the Lord's table, at the ministration of the sacrament, in use at that period? If it could be shown that they were, this would indeed be a legal and full justification of the replacing of them now, however strange and novel such a decoration might appear. But nothing of the kind has been affirmed; and, although it seems to have been suggested by the learned advocate for Mr. Smith, that the promoter of the suit was bound to prove that these ornaments were not then in use, it cannot surprise any reasonable person, that the commissioners did not assent to this demand. The only direction in the rubric is, 'that the table at the communion time have a fair white linen cloth upon it;' and the 82nd canon 'appoints, that the communion table shall be covered in time of divine service with a carpet of silk, or other decent stuff, and with a fair linen cloth at the time of ministration.' This must be holden virtually to exclude all else, except what is used, or may be used, in the service itself.

"If any one venture to go further—to add anything which he may deem an ornament—he does it at his peril; he must be prepared to show, that what he adds 'was in use, in this Church of England, in the second year of the reign of King Edward VI. ;' else he renders himself liable to ecclesiastical censures.

"Something, I understand, was said before the commissioners respecting the custom, in the very earliest and purest ages, of decorating churches with flowers. That such was the custom of primitive times, admits not of doubt; but it can hardly be necessary to say, that this, of itself, is no justification of the adoption of such a practice now. If it were, the performance of divine service, instead of aiming at anything like uniformity, would vary with the varying measures of antiquarian learning, which might chance to distinguish the different authorities in the several parishes amongst us.

"But, if the claim of primitive usage could prevail in favour of decoration

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The use of the
cross as an
ornament of
the sacramental
table, not
justified by
primitive
usage.

with flowers, certainly no such pretension can be set up for the use of the cross, as an ornament of the sacramental table.

“ Such a thing was never heard of, during more than the first three centuries of the Christian era; and Durandus, the authority relied on by the defendant’s advocate, for saying, that ‘ the proper place for the cross is the Lord’s table,’ was a bishop and a canonist of the thirteenth century; therefore very little entitled to our attention on a question respecting the present law of our church, even if the reasons, stated by him, were as solid, as they are, in truth, shadowy and unsatisfactory. His principal reason is this : — ‘ The cross on the altar is placed in the middle, between the two candlesticks, because Christ in the church is the mediator between the two peoples (the Jews and the Gentiles), for he is the corner-stone making of both one.’

“ I abstain from discussing this reason; nor should I have mentioned it, did it not suggest a very strong presumption, that the cross was not retained on the holy table, by authority of parliament, in the second year of King Edward VI.; for in the royal injunctions set forth in that year (the document referred to), while there is an express order, that the two candlesticks be retained (though for a very different reason from that which Durandus gives, and one with which the cross has no concern, viz. ‘ that Christ is the very true light of the world’), there is not a word respecting the cross; surely, therefore, the cross is not there retained. And, if any doubt could remain, it would be removed by another passage of those injunctions, in which, there being an express condemnation, of ‘ whosoever doth superstitiously abuse ceremonies to the great peril and danger of his soul’s health,’ one of the instances specified is ‘ making of crosses of wood upon Palm Sunday, in time of reading of the Passion’ — a time, when, if ever, the exhibition of a cross should seem peculiarly appropriate.

“ In the injunctions of Archbishop Grindal in 1571, most particular directions were given to the churchwardens as to the furniture, and other things, which they were to provide, especially for the communion table, but no cross is in the number. There is, however, in another part, a direction both to the churchwardens and to the minister, to see that all crosses are utterly defaced, broken, and destroyed, within the province of York.

“ Five years afterwards, in 1576, when he had become Archbishop of Canterbury, in the articles to be inquired of within this province, is specially included the following : — ‘ Whether crosses, and such other relics and monuments of superstition, be utterly defaced, broken, and destroyed.’ Now, without claiming for these, his injunctions and articles, the authority of law, and without deferring largely to his judgment, we must at least see in them conclusive evidence, in the absence of everything to the contrary, that what an archbishop, first of York, and then of Canterbury, thus peremptorily ordered to be destroyed, could not have been among the ornaments, which, only twelve years before, and under the same sovereign, that sovereign Queen Elizabeth, were ordered by statute to ‘ be retained and be in use,’ because they ‘ were in this Church of England, by the authority of parliament, in the second year of the reign of King Edward VI.’

• “ The truth is, that however venerable, significant, and affecting, the

material image of the cross, in itself, is, the gross abuses, which had prevailed respecting it, not only rendered the use of it in divine service utterly intolerable, but caused, as is notorious, very strong and lasting prejudices to prevail against even the transient image of it, made in the air, after the undisputed usage of christian antiquity. And even these prejudices were wisely yielded to by our reformers, so far as could with propriety be done; for they rejected the practice of making the transient image on every occasion but one — that of marking the forehead of the newly baptized with the sign of the cross — an occasion on which it could not be forborne, consistently with the duty of a sound branch of the Catholic church. For, as was declared by the bishops, in answer to the ‘Exceptions of the Non-conformist Ministers,’ at the Savoy conference, just before the last review of the Book of Common Prayer, — ‘the cross was always used in the church in *immortali Lavacro*’ (Tertull.); ‘and therefore to testify our communion with them, as we are taught to do in our creed, as also in token that we shall not be ashamed of the cross of Christ, it is fit to be used still, and we conceive cannot trouble the conscience of any that have a mind to be satisfied.’

“Such having been the wise and charitable course deliberately adopted by the governors of our church, it is surely not too much to expect and demand, that no individual clergyman should presume to traverse it. For what must be the consequences of a different course on his part? Could the sudden and unauthorised reappearance of a cross on the Lord’s table — prepared, as in the present case that table was, for the celebration of the highest and the holiest mysteries — could it fail to give very grave and very reasonable offence? Must not such a spectacle have excited in many minds feelings of displeasure — it may be something akin to anger — ill according with that holy calmness and composure, which it must have been the wish, as it was the duty, of all, at such a season, to seek to cherish? Could a sober-minded minister of God’s word and sacraments voluntarily do anything likely to lead to this result? It is impossible. Mr. Smith, I am sure, did not perceive, manifest as we may deem it, the danger which he incurred. He only saw, or thought he saw, in this exhibition of a cross, something peculiarly appropriate to a sacrament, in which ‘we do show the Lord’s death till he come.’

“And yet there is one obvious reason, which may satisfy every considerate person, of the solid grounds of piety, as well as of prudence, which guided our reformers in rejecting this symbol from forming any part of the decoration of the holy table.

“Doubtless, it is a memorial of the death of Christ. But is it the best, the truest memorial? Is it even auxiliary to the right apprehension of the full virtue of that blessed sacrament, of which our Lord said, ‘do this in remembrance of me?’ True, both the cross, the humanly selected symbol, and the divinely instituted sacrament, are alike memorials of the death of Christ. But man’s invention looks to the mere death; our Lord’s ordinance to ‘the sacrifice of the death of Christ.’ For as he, ‘by his own blood, entered in once into the holy place’ ‘now to appear in the presence of God for us’ — continually, that is, commemorating, and pleading for us, in heaven, his one sacrifice of himself; so, in the Holy Eucharist, he hath commanded his ministers continually to commemorate and plead before God the same

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sacrifice upon earth, reciting his very words, and repeating his whole action, when he instituted the sacrament.

“Again, the cross, man’s invention, looks only to the crucified body—the body in its utmost humiliation: Christ’s ordinance regards the body, not in its humiliation only; but also, and chiefly, in its glory. It is to us a memorial indeed of his death, but it is, at the same time, both a memorial, and a communion, of ‘the inestimable benefit of that his precious death.’ ‘We do show that death, by eating and drinking’ the elements of bread and wine, made by his blessed word to be to us, verily and indeed, his body and his blood—‘drawing near with faith, and taking that holy sacrament to our comfort;’ in other words, openly acting our belief, that ‘our souls are as really strengthened and refreshed by the body and blood of Christ,’ ‘taken and received by the faithful in that sacrament,’ ‘as our bodies are by the bread and wine.’

“This is the true and full memorial and commemoration of our Lord’s death—instituted by Christ himself—observed by the holy Catholic Church through all ages, and which will never cease to be observed by it, ‘till he come,’—till faith be swallowed up in knowledge,—till ‘we shall know, even as we are known.’

*The outward,
the material
cross, is pe-
culiarly un-
fitted to be
placed in con-
tact with the
sacramental
symbols.*

“In truth, therefore, the outward, the material cross, is peculiarly unfitted to be placed in contact with the sacramental symbols. Instead of exciting the mind to due contemplation of the triumphant issue of our Lord’s sufferings, it tends to chain it down to the sufferings themselves. Instead of being, as doubtless Mr. Smith, and others, design it to be, a mark of high and special veneration of the sacrament, it does, in truth, accord rather with the low and degrading notions of those, who see in that holy ordinance nothing more than a bare remembrance of what is passed and gone; not, as it is in truth, a symbol of that which abideth for ever, even of the powerful intercession of our great high priest—of him, ‘who ever liveth to make intercession for us.’ And thus, in the exhibition of the cross on the Lord’s table, we have only a fresh instance of the foolishness of man’s wisdom, when it seeks to improve, or to add to, the institution of Christ himself.

“But I have done. If I have said more than the particular occasion may seem to demand, it is because I feel the necessity of opposing myself openly, and firmly, to every unauthorised innovation, from whatever quarter, in our form of Common Prayer; especially in that most sacred portion of it, the administration of the sacraments of the Lord—for, be it never forgotten by us, that ‘the due use of the sacraments’—in other words, the reverent observance of them, and not this only, but also a thankful sense of the saving grace conferred in them, and a firm adherence to the true Catholic faith respecting them, in its purity at once, and its integrity—is by our church itself declared to be essential to a true church—it is, indeed, ‘*Articulus stantis vel cadentis ecclesiæ.*’ Surely, not less can be said of those heavenly ordinances, in which (to use the language of our homily of the sacraments) ‘God imbraceth us, and offereth himself to be imbraced of us’—which ‘set out to the eyes, and other outward senses, the inward working of God’s free mercy, and do, as it were, seal in our hearts the promises of God’—which are ‘visible signs, expressly commanded in the New Testament, whereunto is annexed the promise of free forgiveness of our sins, and of our holiness, and joining in Christ.’ Surely of the honour

of these sacraments, of the solemnity, the propriety, the due and uninterrupted order of their ministration amongst us, we never can be too jealous.

"In conclusion, as there is no ground on which the act, admitted by Mr. Smith, can be deemed lawful, it is my duty to adjudge that he be admonished, and I do now admonish him, not again to offend in the like manner; and I further order that he pay the costs of these proceedings."

In *Bennett v. Bonnaker* (1) Sir John Nicholl observed, "By the general law, the church service, according to the form prescribed by the Book of Common Prayer, is to be regularly performed every Sunday in the morning and evening. If less duty is required, it is to be supposed that the relaxation has been adopted with the approbation of the diocesan, and has been permitted owing to the circumstances of the parish; and as the service is to be performed for the use of the parishioners, such relaxation may properly be granted in certain cases; but, if it be so granted, the minister must strictly adhere to the terms prescribed, and must not vary them at his own pleasure, for his own convenience, and on his own authority. It is the diocesan who is to judge of the degree of relaxation to be allowed."

By stat. 13 & 14 Car. 2. c. 4. s. 7. "in all places where the proper incumbent of any parsonage or vicarage, or benefice with cure, doth reside on his living, and keep a curate, the incumbent himself in person, not having some lawful impediment, to be allowed by the ordinary of the place, shall once at the least in every month, openly and publicly read the common prayers and service in and by the said book prescribed; and if there be occasion, administer each of the sacraments and other rites of the church, in the parish church or chapel of or belonging to the same parsonage, vicarage, or benefice, in such order, manner, and form, as in and by the said book is appointed, upon pain to forfeit the sum of 5*l.* to the use of the poor of the parish for every such offence."

By canon 14. "the Common Prayer shall be said or sung distinctly and reverently, upon such days as are appointed to be kept holy by the Book of Common Prayer, and their eves, and at convenient and usual times of those days, and in such place of every church as the bishop of the diocese, or ecclesiastical ordinary of the place, shall think meet for the largeness or straitness of the same, so as the people may be most edified. All ministers likewise shall observe the orders, rites, and ceremonies prescribed in the Book of Common Prayer (2), as well in reading the Holy Scriptures and

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Judgment of the Bishop of Exeter *in re Parks Smith* (Clerk).

By the general law, the church service ought to be regularly performed every Sunday morning and evening.

Stat. 13 & 14 Car. 2. c. 4. s. 7. Incumbents of livings keeping curates, must read the church service once every month.

Canon 14. The prescript form of divine service to be used on Sundays and holy-days.

(1) 2 Haggs 27.

(2) All ministers shall observe the orders, rites, and ceremonies prescribed in the Book of Common Prayer. — "There seems," said the Bishop of Hereford in his charge in June, 1845, "unhappily still to exist in some quarters a dissatisfaction with our own church, amounting at something deeper and more spiritual than a smothering, it is said, which may give free scope to the feelings of awe, mystery, reverence, and devotedness. Surely there is enough of spirituality, of reverence, and of devotion in our liturgy, which is agreeable to, and was selected from the most ancient and orthodox models. It wants, indeed, the innovations of later times, but it has all the offices of the western church that were known and used in the first three centuries;

and was reduced into form from the earliest and purest examples then known by the holy martyrs and confessors of the Reformation. The three creeds are retained — the creed's of the ancient church; the four first general councils are appealed to; nothing is required to be believed of any man as necessary to salvation, which cannot be proved from the sacred scriptures; whilst all the new articles of the creed of Pope Pius IV. are wisely rejected as notorious additions, without any warrant of scripture, and without any primitive authority. Honest aspirants after truth and antiquity, therefore, need not resort to Rome. For take away from that church all that bold and sacrilegious hands have dared to introduce without the sanction of God's word,

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saying of prayers, as in administration of the sacraments, without either diminishing in regard of preaching, or in any other respect, or adding any thing in the matter or form thereof."

and then what remains will be ancient christianity, and a purity of faith and practice in substantial agreement with our own. Bordering upon, as we do, and once a portion of, the principality of Wales, we have good reason to believe that christianity was first introduced into these islands by the labours of an apostle, or of apostolic men, and had made much progress in these parts long before the missionaries of Rome ever touched our shores. And if, in the course of time, in ages of ignorance and darkness, our church became so closely connected with her, and through her usurpations so subjected to her power, as to partake of her corruptions and her sins, at length the burden was too grievous to be borne, the bondage was broken and rent asunder, and our present purity of faith and practice was restored on the authority of God's word, and on the testimony of the primitive fathers. Are you now, after 'three centuries' enjoyment of freedom, to be again burdened with a heavy yoke, which your fathers could not bear, and to be again brought under the tyrannous rule of one who 'sitteth in the temple of God, exalting himself above all that is called God,' usurping a title and a dignity which cannot be proved to have any foundation in reason, in scripture, or in historic truth? Against the multiplied and dangerous errors of Rome, our venerable reformers testified unto death. Are we so degenerate as to be beguiled into the snare which her ever wakeful ambition is continually plotting for our captivity, entanglement, and ruin?

"We hear much of her universality. We own her to be a part of the church universal, but not the universal church itself. Nor can her claim to this distinction ever be established till men disregard the meaning of words, and agree to consider a part as equal to the whole.

"We hear much also of her antiquity. But error may be of ancient date as well as truth. We can assuredly tell when many of her most objectionable tenets and ritual observances were totally unknown, and how they first came into vogue in these later ages of the world. Of the rest we affirm that 'in the beginning it was not so;' and that they crept in during the season of that gross darkness which covered the people in the mediæval times. It was 'while men slept' that the tares were sown among the wheat. Matt. xiii. 25.

"We hear loud vauntings of her infallibility. And hitherto she has prudently restrained the free circulation of the scriptures, lest the people should think and judge for themselves, and peradventure break loose from her communion. She requires an implicitness of faith not required by our Lord and his apostles, who commended their followers for searching the scriptures, and for

exercising their reason to discover the truth. To forbid the laity to read the Bible lest they should fall into heresy, is a mere pretext. They are interested in knowing the truth; and they desire and need to have it brought plainly and faithfully before them. No danger is to be apprehended from them. They originate no heresies. Ecclesiastical history testifies to the fact, that from the earliest times, ordained ministers have been the authors, and promulgators, and abettors of almost all the heresies and schisms which have perplexed and divided the Christian church. Let Romanists extol the primitive fathers, whilst, as those fathers did, we extol the scriptures; and, as they also did, we refer all men without exception to that record, and to no other infallible authority. More reasonable would it be for an infallible church to supply an infallible commentary on holy scripture, for the safe guidance of the faithful, than either, as now, to leave them wholly in the dark, or to put any restriction upon what all ought, and are intended and commanded, to know for their soul's health. Besides, decrees and definitions without end, made by general councils and confirmed by popes, other councils and other popes have in their turn contradicted and condemned. In pretending to exemption from error, which humbler Christians are wont to regard as an exclusive attribute, as the sole prerogative of Almighty God, it were well for Rome to show where, in his word, that power is granted to her, especially when she has issued many decrees so adverse to the plain meaning and words of scripture that no candid or intelligent person can gainsay the fact. Here lies the main difficulty with which the Church of Rome has to struggle. Our sentence is, 'to the law and to the testimony,' knowing that the truth is 'noted in the book of God's word,' as that memorial of his revealed will, which should 'be for the time to come for ever and ever;' so that whatever is contrary thereto stands self-condemned.

"Some, however, are so bewildered amid the multitude of divisions among Protestants, that, for relief in their uneasiness, they have recourse to Rome, as pretending to be one and infallible. But, with all her pretensions, do they discover no divisions there? Is it even agreed, and may it be condescendingly made known to the world, where this idol, infallibility, rests? whether with the pope alone, or with the pope and council, or where else?

"We do appeal to a really unerring judge, even to the Spirit of God, as declared in his written revelation. To this judge all may come at all times and have their doubts resolved, if they come in simplicity and with a teachable disposition. They will then need

By stat. 1 & 2 Vict. c. 106. s. 80. the bishop can order two full services, and each of such services to include a sermon or lecture on every Sunday throughout the year, or any part thereof, in the church or chapel of every or any benefice within his diocese, whatever may be the annual value or the population thereof; and also in the church or chapel of every parish or chapelry where a benefice is composed of two or more parishes or chapelries, in which there shall be a church or chapel, if the annual value of the benefice arising from that parish or chapelry shall amount to 150*l.*, and the population of that parish or chapelry shall amount to four hundred persons.

A provision then occurs, that the enactments of stat. 58 Geo. 3. c. 45. s. 65. are to remain unaffected, by which the bishop of any diocese can direct the performance of a third or additional service in the several churches or chapels within his diocese.

By stat. 1 & 2 Vict. c. 106. s. 106. no spiritual person shall serve more than two benefices in one day except from an unforeseen and pressing emergency, in which case the spiritual person who shall so have served more than two benefices must forthwith report the circumstance to the bishop of the diocese.

By stat. 2 & 3 Vict. c. 30. the bishop of the diocese in which any benefice having more than one spiritual person instituted, or otherwise admitted

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Stat. 1 & 2
Vict. c. 106.
s. 80.

Bishops may
enforce two
services on
Sundays in
certain cases.

Stat. 1 & 2
Vict. c. 106.
s. 106.

No spiritual
person to serve
more than two
benefices in one
day.

Stat. 2 & 3
Vict. c. 30.

no other, as they will find no surer guide: one, too, whose decisions will be far easier of comprehension, and more worthy of trust than the decision and dicta of any tribunal of man upon earth. Besides, we have yet to learn how, in a matter of such intense personal interest as the concerns of religion, that uniformity of belief which is derived from implicit confidence in others can be taken as conclusive evidence of truth, and not rather as the sign and consequences of spiritual thralldom, or of unenquiring indifference to the subject. Compared with our manifold divisions, there may be few sects among the adherents of the Roman pontiff, and there may be fewer still among the submissive followers of the Arabian prophet. But were there no divisions in the apostolic age, and in the ages immediately subsequent? St. Augustine enumerates no less than eighty-eight different sects as existing in his day. Other ancient writers testify to the same melancholy want of unity among professing Christians of their times. But of all the heresies which have ever disfigured the face of Christendom, the Church of Rome herself stands forth the greatest (to say nothing of the extent of her sway, the length of her duration, and the despotism of her rule), by reason of her anti-scriptural and dangerous character. For not a word can be found in scripture to support most of her peculiar and exclusive doctrines. No, nor fond as she is of tradition, can any genuine remains of the fathers of the first four centuries be produced to countenance those favourite dogmas of invocation of saints, worshipping of

images, prayer in an unknown tongue, the universal supremacy of the bishop of Rome, the infallibility of his church, the seven sacraments, auricular confession, communion in one kind, transubstantiation, and many other pernicious doctrines, though a belief in each and in all of these dogmas is declared by the Council of Trent to be universally necessary to salvation. This is what naturally comes of setting up the traditions of men above 'the greater witness of God.' And it may serve us as a beacon light to warn us against the peril of following in her track, lest we, like her, make shipwreck of our faith. For instance, to address prayer in any way, or under any guise, to or through the blessed Virgin, or the saints—as some wavering Protestants appear inclined to do—is to abandon the liberty which God has given us. It looks as if we doubted his promises, or his goodness. It implies a suspicion that we do not believe the merits of Christ to be infinite, inasmuch as infinity neither needs, nor admits of, any addition. Such intermediate prayer deprives the Christian of that immediate, direct communion with his Lord and Saviour, which is his main stay and comfort in this life, and all his hope for the next. A chief argument of old used to prove the deity of the Son and of the Holy Ghost against the Arians and other early heretics, was drawn from the fact of prayer being addressed to both by the universal church from the beginning. But the strength, the consistency, and the value of this argument will be utterly gone, if prayer may be lawfully addressed to any created being whatever."

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When the
bishop can
order an appor-
tionment of
spiritual duties.

Daily prayers.

In what part of
the church.

Directions con-
tained in a con-
stitution of
Archbishop
Peccham, as to
what the
priest shall
explain.

or licensed to the cure of souls, can apportion between or among such spiritual persons the spiritual duties, if no cause be shown to the contrary.

By the preface to the Book of Common Prayer, "all priests and deacons are to say daily the morning and evening prayer, either privately or openly, not being let by sickness, or some other urgent cause."

"And the curate that ministereth in every parish church or chapel being at home, and not being otherwise reasonably hindered, shall say the same in the parish church or chapel where he ministereth; and shall cause a bell to be tolled thereunto, a convenient time before he begin, that the people may come to hear God's word, and to pray with him."

By the rubric, before the common prayer of the 2 Edw. 6., it was ordered thus: "The priest being in the quire (1), shall begin (2) with a loud voice the Lord's Prayer, called the Paternoster."

By the rubric, before the present common prayer, "the morning and evening prayer shall be used in the accustomed place of the church, chapel, or chancel, except it shall be otherwise determined by the ordinary of the place."

Respecting what the priest shall explain, a constitution of Archbishop Peccham contains the following directions:—"Every priest shall explain to the people, four times a year, the fourteen articles of faith, the ten commandments, the two evangelical precepts, the seven works of mercy, the seven deadly sins with their consequences, the seven principal virtues, and the seven sacraments of grace. The fourteen articles of faith (whereof seven belong to the mystery of the Trinity, and seven to Christ's humanity) are, 1. The unity of the divine essence in the three persons of the undivided Trinity. 2. That the Father is God. 3. That the Son is God. 4. That the Holy Ghost, proceeding from the Father and the Son, is God. 5. The creation of heaven and earth by the whole and undivided Trinity. 6. The sanctification of the church by the Holy Ghost, the sacraments of grace, and all other things wherein the Christian church communicateth. 7. The consummation of the church in eternal glory, to be truly raised again in flesh and spirit, and opposite thereunto the eternal damnation of the reprobate. 8. The incarnation of Christ. 9. His being born of the blessed Virgin. 10. His suffering and death upon the cross. 11. His descent into hell. 12. His resurrection from the dead. 13. His ascension into heaven. 14. His future coming to judge the world. The Ten Commandments are the precepts of the Old Testament. To these the Gospel addeth two others, to wit, the love of God and of our neighbour. Of the seven works of mercy, six are collected out of the Gospel of St. Matthew: to feed the hungry, to give drink to the thirsty, to entertain the stranger, to clothe the naked, to visit the sick, and to comfort those that are in prison; and the seventh is gathered out of Tobias, to wit, to bury the dead. The seven deadly sins are pride, envy,

(1) *In the quire*—That is, in his own seat there, which was the custom in Edward the Sixth's time, and as is still done in some churches, but in the beginning of Queen Elizabeth's reign, reading desks began to be set up in the body of the church, and divine service to be read there by appointment of the ordinaries, according to the power vested

in them by the rubric of the 5 & 6 Edw. 6. Gibson's Codex, 297.

(2) *Shall begin*—All that now goes before, viz. the sentences, exhortation, confession, and absolution, were first inserted in the second book of Edward the Sixth. 2 Burnet, 76.

anger or hatred, slothfulness, covetousness, gluttony and drunkenness, luxury. The seven principal virtues are faith, hope, and charity, which respect God; prudence, temperance, justice, fortitude, with regard unto men. The seven sacraments of grace are baptism, confirmation, orders, penance, matrimony, the eucharist, and extreme unction. (1)

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Rubric after the Nicene Creed. "Then shall follow the sermon, or one of the homilies already set forth, or hereafter to be set forth, by authority."

Homilies.

Form of ordering deacons:—"It appertaineth to the office of a deacon" ... "to read holy scriptures and homilies in the church."

Art. 35. "The second book of homilies, the several titles whereof we have joined unto this article, doth contain a godly and wholesome doctrine, and necessary for these times, as doth the former book of homilies, which were set forth in the time of Edward VI.; and therefore we judge them to be read in churches by the ministers, diligently and distinctly, that they may be understood by the people."

Art. 35.

Canon 49. "No person whatsoever, not examined and approved by the bishop of the diocese, or not licensed, as is aforesaid, for a sufficient or convenient preacher, shall take upon him to expound in his own cure, or elsewhere, any scripture or matter of doctrine; but shall study to read plainly and aptly (without glossing or adding) the homilies already set forth, or hereafter to be published by lawful authority, for the confirmation of the true faith, and for the good instruction and edification of the people."

Canon 49.
Ministers, not
allowed preachers,
may not expound.

Canon 46. "Every beneficed man, not allowed to be a preacher, shall procure sermons to be preached in his cure once in every month at the least, by preachers lawfully licensed, if his living, in the judgment of the ordinary, will be able to bear it. And upon every Sunday, when there shall not be a sermon preached in his cure, he or his curate shall read some one of the homilies prescribed or to be prescribed by authority to the intents aforesaid."

Canon 46.
Beneficed men
not preachers
to procure
monthly sermons.

By article 24. "it is a thing plainly repugnant to the word of God, and the custom of the primitive church, to have public prayer in the church, or to minister the sacraments, in a tongue not understood of the people."

Art. 24.
Stat. 2 & 3
Edw. 6. c. 1.
s. 5.

And by stat. 2 & 3 Edw. 6. c. 1. s. 5. it is provided, "that it shall be lawful to any man that understandeth the Greek, Latin, and Hebrew tongue, or other strange tongue, to say and have the prayers of matins and even-song in Latin, or any such other tongue, saying the same privately, as they do understand."

In the public
prayers of the
church, and in
the ministration
of the sacraments,
the English tongue
to be used.
Excepted instances.

Sect. 6. "And for the further encouraging of learning in the tongues, in the universities of Cambridge and Oxford, it shall be lawful to use and exercise in their common and open prayer in their chapels (being no parish churches) or other places of prayer, the matins, even-song, litany, and all other prayers (the holy communion, commonly called the mass, excepted) prescribed in the said book, in Greek, Latin, or Hebrew."

By stat. 13 & 14 Car. 2. c. 4. s. 18. "it shall be lawful to use the morning and evening prayer, and all other prayers and service prescribed in and by the said book, in the chapels or other public places of the respective colleges and halls in both the universities, in the colleges of

Stat. 13 & 14
Car. 2. c. 4.
s. 18.
Who may
use the service
in Latin.

(1) Lyndwood, Prov. Const. Ang. 43. 54.

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Westminster, Winchester, and Eton, and in the convocations of the clergy of either province, in Latin."

And by sect. 27. the bishops of Hereford, St. David's, Asaph, Bangor, and Llandaff, and their successors, shall take order that the said book be translated into the British or Welsh tongue, to be used in Wales where the Welsh tongue is commonly used; and at the same time an English book shall be had there likewise, that such as understand the same may have recourse thereunto, and such as do not understand the same may, by conferring both tongues together, the sooner attain to the knowledge of the English tongue.

Stat. 5 Eliz.
c. 28. s. 1.
The Bible and
Book of Com-
mon Prayer to
be translated
into the Welsh
tongue.

Canon 58.
Habit of the
minister offici-
ating.

By stat. 5 Eliz. c. 28. s. 1. the same bishops are in like manner required to cause the Old and New Testament to be translated into Welsh, and to have one English and one Welsh copy in every such respective place.

By canon 58. "every minister saying the public prayers, or ministering the sacraments, or other rites of the church, shall wear a decent and comely surplice (1) with sleeves, to be provided at the charge of the parish. And if any question arise touching the matter, decency, or comeliness thereof, the same shall be decided by the discretion of the ordinary. Furthermore, such ministers as are graduates shall wear upon their surplices at such times, such hoods as by the orders of the universities are agreeable to their degrees; which no minister shall wear, being no graduate, under pain of suspension. Notwithstanding it shall be lawful for such ministers as are not graduates, to wear upon their surplices, instead of hoods, some decent tippet of black, so it be not silk."

But this canon is in part destroyed by the statute law and by the rubric before the present common prayer.

Stat. 1 Eliz.
c. 2. s. 25.
Ornaments
of the church
and ministers.

For by stat. 1 Eliz. c. 2. s. 25. it is provided, "that such ornaments of the church, and of the ministers thereof, shall be retained and be in use, as was in this Church of England by authority of parliament in the second year of the reign of King Edward VI., until other order shall be therein taken, by the authority of the Queen's Majesty, with the advice of her commissioners appointed and authorised under the great seal for causes ecclesiastical, or of the metropolitan of this realm."

Which *other* order as to this matter was never taken. But by the rubric, before the common prayer of the 13 & 14 Car. 2., "it is to be noted, that such ornaments of the church, and of the ministers thereof at all times of their ministration, shall be retained and be in use as were in this Church of England by the authority of parliament in the second year of the reign of King Edward VI."

Therefore it is necessary to recur in this matter to the Common Prayer Book established by act of parliament in the second year of King Edward VI.: in which there is this rubric:—"In the saying or singing of 'matens' and 'even-songe,' 'baptizyng,' and 'burying,' the minister in parish churches and chapels annexed to the same shall use a 'surplex.' And in all cathedral churches and colleges the archdeacons, deans, provosts, masters, prebendaries, and fellows, being graduates, may use in the quire, beside their surplices, such hoods as pertaineth to their several degrees which they have taken in any university within this realm. But

(1) *Vide ante*, 292.

in all other places every minister shall be at liberty to use any surplice or no. It is also seemly that graduates, when they do preach, should use such hoods as pertaineth to their several degrees."

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So that in marrying, churching of women, and other offices not here specified, and even in the administration of the holy communion, it seems that a surplice is not necessary. And the reason why it is not enjoined for the holy communion in particular is, because other vestments are appointed for that ministration, which are as follow:—"Upon the day, and at the time appointed for the ministration of the holy communion, the priest that shall execute the holy ministry shall put upon him the vesture appointed for that ministration, that is to say, a white albe plain, with a vestment or cope. And where there be many priests or deacons, there so many shall be ready to help the priest in the ministration as shall be requisite; and shall have upon them likewise the vestures appointed for their ministry, that is to say, albes with tunacles." (1)

In the 2 Edw. 6., the order for morning and evening prayer began, as previously stated, with the Lord's Prayer, and ended with the third collect for grace, the other five prayers that now follow having been subsequently added. (2)

Morning and
evening prayer.

From which, and from other alterations, it will appear, that besides the several offices being now generally put into one, which at first were distinct and separate, they are now become much longer than originally they were, by the additions from time to time which have thereunto been made.

"The psalter followeth the division of the Hebrews and the translation of the great English Bible, set forth and used in the time of King Henry VIII. and Edward VI." (3)

Psalter.

Canon 15. "The litany shall be said or sung when, and as it is set down in the Book of Common Prayer, by the parsons, vicars, ministers, or curates in all cathedral, collegiate, parish churches and chapels, in some convenient place, according to the discretion of the bishop of the diocese, or ecclesiastical ordinary of the place. And that we may speak more particularly, upon Wednesdays and Fridays weekly, though they be not holidays, the minister, at the accustomed hours of service shall resort to the church or chapel, and warning being given to the people by tolling of a bell, shall say, the litany prescribed in the Book of Common Prayer: whereunto we wish every householder, dwelling within half a mile of the church, to come or send one at least of his household, fit to join with the minister in prayers."

Canon 15.
Litany.

Of the prayers and thanksgivings which now stand at the end of the litany service, the first two prayers (for rain and fair weather) were at the end of the communion service in the book of the 2 Edw. 6. To which were added in the 5 Edw. 6. these prayers. In the time of dearth and famine; in the time of war; and in the time of plague and sickness. The

Prayers and
thanksgivings
after the litany.

(1) The alb differs from the surplice in being close sleeved.

"And whosoever the bishop shall celebrate the holy communion in the church, or execute any other public ministration, he shall have upon him, beside his rochet,

a surplice or alb, and a cope or vestment, and also his pastoral staff in his hand, or else borne or holden by his chaplain."

(2) Gibson's Codex, 300.

(3) Rubric.

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prayer to be used after any other, and the thanksgivings for rain, fair weather, plenty, and deliverance from enemies were brought in by King James I. The prayers, in the Ember weeks, for the parliament, and for all conditions of men, were added in 1661; as were also the general thanksgiving, and the thanksgiving for public peace, and for deliverance from the plague. (1)

By the several Acts of Uniformity, the form of worship directed in the Book of Common Prayer shall be used in the church, and no other (2);

(1) Gibson's Codex, 301.

(2) *The form of worship directed in the Book of Common Prayer shall be used in the church, and no other* — "We come," observed the Bishop of Lincoln in his charge at the triennial visitation in 1846, "to the provision made by the reformers for the celebration of divine worship. Commissioners (2 Burnet's History of the Reformation, 156. ed. Oxon. 1819), had been appointed by Henry VIII. to alter the services then in use. This, therefore, was the subject which first occupied the attention of the reformers in the reign of Edward VI., and Bishop Burnet (*ibid.* 150.) has correctly stated their aim to have been to change nothing for novelty's sake; to bring back the services of the church as nearly as possible to the primitive model, removing all superstitious practices and observances which had been grafted upon them in later times. The liturgy (Cardwell, *Two Liturgies*, Preface, 6. Conferences on the Book of Common Prayer, 4.), however, first put forth, was considered by many to bear too near a resemblance to the Romish services, and a revision took place in 1552. The liturgy, thus revised, underwent some alterations of no great moment at the commencement of the reigns of Queen Elizabeth and James I., and again at the restoration. From that time to the present it has remained unchanged.

"One [concerning the service of the church, prefixed to the Book of Common Prayer] object of the reformers in framing a liturgy was to get rid of the diversity in the mode of celebrating divine service, which before prevailed in different dioceses, and to establish uniformity in the public worship of God. In the beginning of the reign of Elizabeth, the clergy who would be unwilling to use the new liturgy were those who still retained a preference for the doctrine and ritual of the Church of Rome; and against such persons the Act of Uniformity, then passed, was principally directed. But at the restoration, the opponents of conformity were men of a very different description — they objected to all set forms of prayer, or at least demanded that the minister should have free scope for the exercise of what they termed his gift of prayer. They adopted the opinions of those reformers who were driven abroad during the persecution in the reign of Mary, and brought back with them, on their return to their native land, the views, both of doctrine and

discipline, prevailing in the foreign Protestant churches, they thought that the Church of England had not departed sufficiently from that of Rome, and still retained in its ritual too many Romish observances. In considering the question of conformity, it may occasionally be useful to keep in mind this distinction between the two classes of persons, against whom the two Acts of Uniformity were severally directed.

"The contents of the Book of Common Prayer may be classed under two heads — the prayers and thanksgivings, and other forms of devotion which the minister is to use; and the rubrics, or directions respecting the manner in which they are to be used, respecting the order, the posture, the different parts of the sacred edifice in which they are to be recited. There is, doubtless, a wide difference between the two, in respect of their intrinsic value and importance; as wide as between the picture and the frame, between the diamond and the gold in which it is set. Yet it is certain that the clergy, when they promise to conform to the liturgy, bind themselves to conform to it in both its parts, not only to use the form of words, but to use it in the manner prescribed in the rubric. While, however, the object aimed at by the framers of the Acts of Uniformity has, in its more important part, been in great measure attained, they have not been equally successful in respect of the other part. Rare, comparatively, are the instances in which a clergyman ventures, in the celebration of public worship, to deviate from the prayers of the liturgy, or to introduce his own extemporaneous effusions; but wide deviations have taken place in practice from the directions of the rubric; and those deviations have now continued for so long a period, and the laity have become so accustomed to them, that the attempt to return to the letter of the rubric is regarded and resented as an innovation. The deviation has come to be considered as the rule. It is not my intention to enter into the discussion of any of the rubrical questions, which have given rise to so much controversy, and called forth so much angry feeling. This diocese, as I have already observed, has been in great measure free from the agitation which has existed elsewhere; and in those dioceses in which it most prevailed, it has been allayed by the reasonable, and wise, and paternal letter of our venerable metropolitan. There are, however, two passages in that letter to

but with this proviso, that it shall be lawful for all men, as well in churches, chapels, oratories, or other places, to use openly any psalms or prayer

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which I cannot refrain from calling your attention. The archbishop says, 'upon careful examination I have found reason to think that some of these questions are more difficult of solution than is commonly imagined, and that the meaning which occurs at first sight is not always the most correct.' In confirmation of the truth of this remark, I would refer you to a volume, published in the course of last year by his grace's chaplain, Archdeacon Harrison. It is an octavo volume of above four hundred pages, and displays a most intimate acquaintance with the history of the rubrics; yet it relates only to four of the points, which have of late been made the subjects of controversy — the dress of the preacher, the prayer before the sermon, the prayer for the church militant, and the offertory. If it was necessary for the learned author to bestow so much research and labour on the elucidation of these four contested points, surely it must be rash, to use no stronger term, in any man, especially in a young man recently admitted into holy orders, to alter on his own authority the practice which he may find existing in the church in which he is appointed to officiate, by the substitution of one which he may deem in stricter conformity to the rubric. It is always a matter of great delicacy to revive a law which has been allowed to fall into desuetude; nor ought the hazard to be run of unsettling the minds and offending the feelings, or, if you please, the prejudices, of our congregations, unless some great good is to be achieved by the revival.

"The other passage to which I wish to call your attention is as follows. — 'All change in the performance of divine service, affecting the doctrines of the church by alteration, addition, or omission, I regard with unqualified disapprobation.' Such change is in truth a dishonest act. The person who resorts to it admits that he is not satisfied with the doctrine of the church as set forth in its formularies; and I can, in respect of the violation of moral obligation, discover little difference between the case of those who, while holding all Romish opinions, retain their position in the Established Church, and of those who change or even the words of the liturgy, in order to accommodate them to their own peculiar views of doctrine.

"I have observed that there appears, on the part of the members of the church, lay or clerical, little desire for a revision of the articles. The case is different with respect to the liturgy. The attention of the lay members of the church is rarely drawn to the articles; but every week at least they are present at the celebration of public worship. They thus become familiar with the offices of the church, and as among so many hearers some will deem themselves

qualified and authorised to criticise what they hear, proposals for a revision of the liturgy are from time to time brought before the public. I would earnestly request all who are inclined to lend a favourable ear to such proposals, to read the conclusion of Dr. Cardwell's learned and candid 'History of Conferences on the Book of Common Prayer,' and then to ask themselves whether, in order to remove blemishes few in number, and confessedly unimportant in character, they would deem it justifiable to encounter all the difficulties, and to run all the hazards, inseparable from the attempt."

The Bishop of Worcester, in his charge at his second visitation in August, 1845, deprecates any restoration to obsolete usages in the celebration of divine worship in the following language: — "When I last addressed you, I deprecated that movement in the church which, under the pretext of a more scrupulous regard to the rubrics and canons, was calculated, as I thought, to produce evil by exciting alarm in the minds of your parishioners, and by substituting a minute observance of forms and ceremonies for the vital spirit of true religion; and I can safely appeal to the experience of the last three years for a confirmation of the views which I then entertained. In those few places in the diocese where the experiment of introducing novelties in the administration of divine service has been tried, it has been, in most cases, followed by dissension and distrust, by the exhibition of empty churches and full meeting-houses. Fortified, therefore, by the experience which we have thus obtained, I venture to repeat the caution which I then gave you, not to persist in the restoration of obsolete usages, however correct you may yourselves consider them when you find them so opposed to the feelings, or even the prejudices, of your people; that you thereby lose your influence over them, and risk the salvation of immortal souls for the sake of a punctilious observance of some trifling ceremonial, or the wearing of one habit rather than another.

"The attempt which has been made to approximate the forms and ceremonies of our church as much as possible to those of Rome is not new, but it has always been successfully resisted by the Protestant feeling of the country. In reading the following description given by Bishop Burnet of Archbishop Laud, we might almost imagine that it had been intended for a more modern divine. 'He was a learned, a sincere, and zealous man, regular in his own life and humble, but was a hot and indiscreet man, pursuing some matters that were either very inconsiderable or mischievous; such as setting the communion table by the east wall of churches, bowing to it, and calling it the

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taken out of the Bible, at any due time, not letting or omitting thereby the service, or any part thereof, mentioned in the said book." (1)

" And whereas heretofore there hath been great diversity in saying and singing in churches within this realm, some following Salisbury use (2), some Hereford use (3), and some the use of Bangor, some of York, some of Lincoln; now from henceforth all the whole realm shall have but one use." (4)

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In the primitive churches, the favourite practice of the Christians to sing hymns in alternate verses is expressly mentioned by Pliny, in one of his epistles to the Emperor Trajan. (5). The Church of Rome afterwards refined upon this practice, as it was their policy to make their ministers considerable in the eyes of the common people; and one way of effecting that was by appointing them sole officers in the public service of the church; and difficult music was introduced, which no one could execute without a regular education of that species. At the Reformation this was one of the grievances complained of by the laity; and it became the distinguishing mark of the reformers to use plain music, in opposition to the complex musical service of the Catholics. The Lutheran Church, to which the Church of England has more conformed in discipline, retained a choral service. (6)

The Calvinistic churches, of which it has sometimes been harshly said " that they think to find religion wherever they do not find the Church of Rome," have discarded it entirely, with a strong attachment to plain con-

altar; the breaking of lectures; the encouraging of sports on the Lord's day, with some other that were of no value.' Burnet's own Times, vol. i. p. 90. 8vo. ed.

" So again, in the reign of Queen Anne, we are told by the same author, that in the year 1712 'there appeared at this time an inclination in many of the clergy to a nearer approach towards the Church of Rome. Hicks, an ill-tempered man, who was now at the head of the Jacobite party, had in several books promoted a notion that there was a proper sacrifice made in the eucharist, and had on many occasions studied to lessen our aversion to popery. The supremacy of the crown in ecclesiastical matters, and the method in which the reformation was carried, was openly condemned. One Brett preached a sermon in several of the pulpits of London, in which he pressed the necessity of priestly absolution, in a strain beyond what was pretended to even in the Church of Rome. He said no repentance could serve without it, and affirmed that the priest was vested with the same power of pardoning that our Saviour himself had. Another conceit was taken up of the invalidity of lay baptism, on which several books were writ; nor was the dispute a trifling one, since by this notion the teachers among the dissenters passing for laymen, this went to the rebaptizing them and their congregations.' "

(1) Stat. 2 & 3 Edw. 6. c. 1. s. 7.
(2) *Salisbury use*: — Lyndwood, speaking of the use of Sarum, says, Quasi tota provincia [Cantuariensis] hunc usum sequitur;

and adds as one reason of it, Episcopus namque Sarum in collegio episcoporum est præcentor, et temporibus quibus Archiepiscopus Cantuariensis solenniter celebrat divina, præsentē collegio episcoporum, chorum in divinis officiis regere debet, de observantiâ et consuetudine antiquâ. Gibson's Codex, 259.

(3) *Some Hereford use*: — In the northern parts was generally observed the use of the archiepiscopal church of York; in South Wales, the use of Hereford; in North Wales, the use of Bangor; and in other places, the use of other of the principal sees, as particularly that of Lincoln. Ayliffe's Parergon Juris, 356.

(4) Pref. to the Common Prayer.
(5) " Affirmabant hanc fuisse summam vel culpæ suæ, vel erroris, quod essent soliti, stato die, ante lucem convenire, carmenque Christo, quasi Deo, dicere secum invicem." Ep. tit. 10. 97.

(6) See the common service of those churches. The agreement of the Lutheran churches with the Church of England was set forth in a tract under that title in 1715; in which it is said, " It might indeed have been shown further—the agreement of the Lutheran churches with ours, in the manner of celebrating the public worship, that they agree with us in using a liturgy, in singing of anthems, &c. But it is not necessary." p. 10.

The above tract appears to have been written to obviate any public prejudice against the House of Hanover, on account of King George the First being a Lutheran.

gregational melody, and that perhaps not always of the most harmonious kind.

The reformation of the Church of England, which was conducted by authority, as all reformations should be, if possible, and not merely by popular impulse, retained the choral service in cathedrals and collegiate chapels. There are certainly, in modern usage, two services to be distinguished: one the cathedral service, which is performed by persons who are in a certain degree professors of music, in which others can join only by ear; the other, in which the service is performed in a plain way, and in which all the congregation nearly take an equal part. It has been argued, that nothing beyond this ought to be permitted in ordinary parochial service, it being *that* which general usage at the present day alone permits. But that carries the distinction further than the law will support; for if inquiries go further back, to periods more nearly approaching the Reformation, there will be found authority sufficient, in point of law and practice, to support the use of more music even in a parish church or chapel.

The first liturgy was established in the time of Edward VI., in 1548. This was followed, after a lapse of four years, by a second, which was published in the reign of the same king in 1552; and the third, which is in use at present, agreeing in substance with the former, as ordained and promulged, 1 Eliz., in 1559.

It is observable that these statutes of Edward VI., which continue in force, describe *even-service* as *even-song*. This is adopted into the statute of the first of Elizabeth. The liturgy also of Edward VI. describes the singing or saying of *even-song*; and in the communion service, the minister is directed to sing one or more of the sentences at the offertory. The same with regard to the litany; that is appointed to be sung. In the present liturgy, the psalter is printed with directions that it should be said or sung, without any distinction of parish churches, or others; and the rubric also describes the apostles' creed "to be sung or said by the minister and people," not by the prebendaries, canons, and a band of regular choristers, as in cathedrals; but plainly referring to the service of a parish church. Again, in the burial service, part is to be sung by the minister and people; so also in the Athanasian and Nicene creeds.

The injunctions that were published in 1559 by Queen Elizabeth completely sanction (1) "the continuance of singing in the church," distin-

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(1) S. 1. For the encouragement of the art, and the continuance of the use of singing in the Church of England, it is enjoined, that because in divers collegiate as also in some parish churches heretofore there hath been livings appointed for the maintenance of men and children for singing in the church, by means whereof the laudable exercise of music hath been had in estimation, and preserved in knowledge, the Queen's majesty, neither meaning in anywise the decay of any thing that might conveniently tend to the use and continuance of the said science, neither to have the same so abused in any part of the church, that thereby the common prayer should be the worse understood by the hearers, willett and commandeth that, first, no alterations be made of such assign-

ments of livings as hath heretofore been appointed to the use of singing or music in the church, but that the same so remain; and that there be a modest and distinct song, so used in all parts of the common prayers in the church, that the same may be as plainly understood as if it were without singing; and yet, nevertheless, for the comfort of such as delight in music, it may be permitted that in the beginning or in the end of common prayer, either at morning or evening, there may be sung an hymn, or such like song, to the praise of Almighty God, in the best melody and music that may be conveniently devised, having respect that the sentence of the hymn may be understood and perceived. *Vide etiam Ref. Leg. p. 85. s. 5.*

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guishing between the music adapted for cathedral and collegiate churches, and parochial churches; also in the articles, for the administration of prayer and sacraments set forth, in the further injunctions of the same queen, in 1564, the common prayer is directed "to be said or sung decently and distinctly, in such place as the ordinary shall think meet, for the largeness and straitness of the church and choir, so that the people may be most edified." If, then, chanting was unlawful any where but in cathedrals and colleges, these canons are strangely worded, and are of disputable meaning. But in order to show they are not liable to such imputation, I shall justify my interpretation of them by a quotation from the "*Reformatio Legum*," a work of great authority in determining the practice of those times, whatever may be its correctness in matter of law. With respect to parish churches in cities, it is there observed, "*Eadem parochiarum in urbibus constitutarum erit omnis ratio, festis et dominicis diebus, quæ prius collegiis et cathedralibus ecclesiis (ut vocant) attributa fuit.*" (1) The metrical version of the psalms was then not existing, the first publication not taking place till 1562, and it was not regularly annexed to the Book of Common Prayer till 1576, after which those psalms soon became the great favourites of the common people. (2) The introduction of this version made the ancient hymns disrelished; but it cannot be meant that they were entirely superseded; for, under the statutes of the Reformation, and the usage explanatory of them, it is recommended, that the ancient hymns should be used in the liturgy, or rather that they should be preferred to any others; though certainly to perform them by a select band with complex music, very inartificially applied, as in many of the churches in the country, is a practice not more reconcilable to good taste than to edification. But to sing with plain congregational music is a practice fully authorised, particularly with respect to the concluding part of different portions of the service. (3)

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OF MATTERS IN
CHURCH.

Stat. 7 Gul. 4.
& 1 Vict. c. 45.
ss. 1—5.

3. PUBLICATION OF MATTERS IN CHURCH.

Stat. 7 Gul. 4. & 1 Vict. c. 45., after reciting that by stat. 58 Geo. 3. c. 64. notices of vestry were directed to be given during, or immediately after, divine service, that by stat. 31 Eliz. c. 3. proclamations of outlawry were directed to be made at the church doors immediately after divine service on a Sunday, and that by divers acts relative to the assessing and collecting of highway and poor rates, and land tax, and other matters, it was required that public notice should be given relating to such matters in the parish churches and chapels, during divine service; and that by ancient custom

(1) *Ref. Leg. c. 6.* This work was published in its present form chiefly under the direction of Walter Haddon, LL.D., master of the Requests, judge of the Prerogative Court of Canterbury, and master of Trinity Hall, Cambridge.

(2) Plain song was retained in most parish churches for the daily psalms; so in the Queen's own chapels, and in the choir of all cathedrals and some colleges, the

hymns were sung after a more melodious manner, with organs commonly, and sometimes with other musical instruments, in the solemnity required. No mention of singing David's psalms in metre, though afterwards they first thrust out the organ, and by degrees also did they the *Te Deum*, *Magnificat*, and the *Nunc dimittis*. Heylin on the Reformation, p. 289.

(3) *Hutchins v. Denzilus*, 1 Comst. 175

notice is usually given in churches, and during divine service, of the times appointed for holding courts leet, courts baron and customary courts; enacts that so much of stat. 58 Geo. 3. c. 69. as directs the publication of such notices to be made in the parish church or chapel on some Sunday, during or immediately after divine service, shall be repealed, and that no proclamation, or other public notice for a vestry meeting, or any other matter, shall be made or given in any church or chapel during or after divine service, or at the door of any church or chapel, at the conclusion of divine service; but that the notices heretofore usually given during or after divine service shall be reduced into writing, and copies thereof shall, previously to the commencement of divine service, on the several days on which such proclamations or notices have heretofore been made or given in the church or chapel of any parish or place, or at the door of any church or chapel, be affixed on or near to the doors of all the churches and chapels within such parish or place.

Sect. 4. No decree relating to a faculty, nor any other decree, citation, or proceeding whatsoever, in any Ecclesiastical Court, shall be read or published in any church or chapel during or immediately after divine service.

Sect. 5. Nothing in the foregoing statute is to extend to the publication of banns, nor to notice of the celebration of divine service or of sermons, nor to restrain the curate, in pursuance of the rules of the Book of Common Prayer, from declaring unto the people what holy days or fasting days are in the week following to be observed, nor to restrain the minister from proclaiming or publishing what is prescribed by the rules of the Book of Common Prayer, or enjoined by the Queen, or the ordinary of the place.

But a clergyman will not be justified to read any protest, during divine service, against the acts of his ecclesiastical superiors. Thus a suit was instituted in the Prerogative Court of Canterbury, by letters of request on the promotion of the archdeacon of Bristol, against the Reverend Martin Richard Whish, vicar of Bedminster, for having, on Sunday the 26th of April, 1846, ordered and directed the parish clerk to read to the congregation assembled in the parish church of Bedminster, a protest, whereby Mr. Whish protested against and denied the ecclesiastical office of the Bishop of Gloucester and Bristol, within the parish of Bedminster, but which suit was stopped, Mr. Whish having signed a submission or apology, in which he fully acknowledged the offence, and freely and voluntarily submitted himself to the jurisdiction and authority of the bishop as his diocesan, and consented to pay the costs of the proceedings. (1)

4. DISTURBERS OF RELIGIOUS WORSHIP.

By stat. 1 G. & M. c. 18. s. 18., if any person maliciously or contemptuously come into any cathedral or parish church, chapel, or other congregation permitted by that act, and disquiet or disturb the same, or misuse any preacher or teacher, such person, upon proof thereof before any justice of the peace, by two or more sufficient witnesses, shall find two sureties to be

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Notices not to be given in churches during divine service, &c.

Notices heretofore usually given during or after divine service, &c. to be affixed to the church doors.

Decrees, &c. of Ecclesiastical Courts not to be read in churches.

Notices purely ecclesiastical.

In re Whish (Clerk).

Clergyman during divine service cannot read a protest against the acts of his bishop.

DISTURBERS OF RELIGIOUS WORSHIP.

Stat. 1 G. & M. c. 18. s. 18.

Disturbers of religious worship, how punished.

(1) The author is indebted to the Bishop of Gloucester and Bristol for the report of the foregoing case.

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bound by recognisance in the penal sum of 50*l.*, and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions, and upon conviction shall forfeit 20*l.* to the use of the crown.

It may be here observed, that in *Rex v. Hube* (1) it was held, that an indictment found at the quarter sessions upon stat. 1 G. & M. c. 18., for disturbing a dissenting congregation, might be removed into the Court of King's Bench by certiorari before verdict, and that upon conviction of several defendants upon such indictments, each was liable to the penalty of 20*l.* imposed by that statute.

At common law, a person disturbing divine service may be removed.

At common law a person disturbing divine service can be removed by any other person there present, upon the same principle of law which allows a man to abate a nuisance. (2)

Duty of churchwardens to preserve order and decorum in the church.

The duty of maintaining order and decorum in the church lies immediately upon the churchwardens; and if they are not present, or being present do not repress any indecency, they desert their proper duty. (3) And by canon 19. they are forbidden to suffer any idle persons to abide either in the church-yard or church porch during the time of divine service, but shall cause them to come in or to depart. (4)

PURCHASES. (5)

*Stat. 17 Geo. 3. c. 53. ss. 10 & 11.—When new buildings are necessary for the residence of the incumbent, the ordinary, &c. can purchase any convenient house and a portion of land — Purchase money, how to be raised — Stat. 7 Geo. 4. c. 66. s. 1.—Who can sell messuages, &c. for the purposes of the foregoing statute — Stat. 1 & 2 Vict. c. 106. ss. 70 & 71. — Where new buildings are necessary for the residence of the incumbent, the bishop may purchase any conveniently situated house, and a certain portion of land — Buildings and lands to be conveyed to patron in trust for the incumbent for the time being — Stat. 1 & 2 Vict. c. 23. s. 9. — House of residence and buildings may be purchased with money or stock belonging to a benefice, in the hands of the governors of Queen Anne's Bounty — Stat. 1 & 2 Vict. c. 23. s. 14. — In case of purchase the powers of stat. 7 Geo. 4. c. 66. will apply — Stat. 43 Geo. 3. c. 107. & stat. 7 Geo. 4. c. 66. — Land or tithes or house of residence and buildings may be purchased with appropriated money — Stat. 43 Geo. 3. c. 108. s. 1. — Persons can, by deed or will, give lands not exceeding five acres, or goods and chattels not exceeding 500*l.*, to promote the objects of stat. 43 Geo. 3. c. 108.—Stat. 55 Geo. 3. c. 147. s. 6.—Land, to the extent of twenty acres, may be purchased—Stat. 56 Geo. 3. c. 52. s. 1.—Money arising from sale of timber, to be applied towards purchase of house and land — Stat. 55 Geo. 3. c. 147. ss. 12 & 13.—Who can convey — Stat. 1 & 2 Vict. c. 107. s. 9.—Five acres of land may be purchased through the Church Building Commissioners as a site for a house of residence — Stat. 8 & 9 Vict. c. 70. ss. 20, 21, & 19. — The purchase money of lands, sold under stat. 58 Geo. 3. c. 45., and belonging to an incumbent in right of his living, may be paid to, and applied by, the governors of Queen Anne's Bounty for the benefit of the incumbent — Such purchase money to be paid to the treasurer of Queen Anne's Bounty, whose receipt shall be a valid discharge — The purchase money of lands need not be paid into the Bank of England, but may be paid to trustees — FORM OF THE DEED OF PURCHASE OF BUILDINGS OR LANDS TO BE ANNEXED TO THE BENEFICE.*

Stat. 17 Geo. 3. c. 53. s. 10.
When new buildings are

By stat. 17 Geo. 3. c. 53. s. 10. (6), where new buildings are necessary to be provided or erected for the habitation and residence of the rector, vicar, or other incumbent, the ordinary, patron, and incumbent of every such

(1) 5 T. R. 542.

(2) *Glover v. Hynde*, 1 Mod. 168.

(3) *Per Lord Stowell*, 2 Consist. 141.

(4) *Vide tit. BRAWLING AND SMITING —*

CHURCHWARDENS.

(5) *Vide tit. MORTGAGES.*

(6) Amended and extended by the statute 55 Geo. 3. c. 147. and statute 56 Geo. 3. c. 52.

living or benefice can contract or authorise the person so to be nominated by them to contract for the absolute purchase (1) of any house or buildings in a situation convenient for the habitation and residence of the rector or vicar of such living or benefice, and not at a greater distance than one mile from the church belonging to such living, benefice, or chapelry, and to contract for any land adjoining or lying convenient to such house or building, or to the house or building belonging to any parochial living or benefice having no glebe, lying near or convenient to the same, not exceeding two acres, if the annual value of such living be less than 100*l.* per annum; nor exceeding two acres for every 100*l.* per annum, if of greater value; and to cause the purchase money for such house or buildings to be paid out of the money to arise under the power and authority of the act. (2)

By stat. 17 Geo. 3. c. 53. s. 11. the purchase money for such land is to be raised by sale of part of the glebe or tithes.

By stat. 7 Geo. 4. c. 66. s. 1., corporations, tenants in fee simple, in tail, and for life, and persons under disability or incapacity, can sell messuages, lands, &c. for the purposes of the foregoing statute.

By stat. 1 & 2 Vict. c. 106. ss. 70 & 71., where new buildings are necessary to be provided for the residence of the incumbent of any benefice, exceeding in value 100*l.* per annum, and avoided after August 14. 1838, and where such new buildings cannot be conveniently erected on the glebe of such benefice, the bishop can contract or authorise, if he think fit, the person so to be nominated by him to contract, for the absolute purchase of any house or buildings in a situation convenient for the residence of the incumbent, and also to contract for any land adjoining or lying convenient to such house or building, or to contract for any land upon which a fit house of residence can be conveniently built.

And that the buildings and lands so to be purchased shall be conveyed to the patron of such benefice in trust, for the sole use and benefit of the incumbent, and be annexed to the benefice, and go in succession with the same for ever; but no contract of purchase made by the nominee will be valid until confirmed in writing by the bishop. (3)

By stat. 1 & 2 Vict. c. 23. s. 9. the monies to arise from the sale of residence houses, &c., after payment of all costs, charges, and expenses of such sales, are to be applied and disposed of by the governors of Queen Anne's Bounty in or towards the erection or purchase of some other house and offices (the dividends arising from the investment of this money are by stat. 2 & 3 Vict. c. 49. s. 14. to be added to the principal), or the purchase of an orchard, garden, and appurtenances, or land for the site of a house, together with land contiguous thereto, not exceeding twelve acres, and suitable for the residence and occupation of the incumbent, and approved of by the ordinary and patron, such approval to be signified under their respective hands, and to be deposited in the registry of the ordinary; and such house is to be the house of residence of the benefice for all purposes whatsoever.

By stat. 1 & 2 Vict. c. 23. s. 14., in case of a purchase under stat. 1 & 2 Vict. c. 23. s. 9., the powers of stat. 7 Geo. 4. c. 66. will apply, by which

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necessary for the residence of the incumbent, the ordinary, &c. can purchase any convenient house, and a portion of land.

Stat. 17 Geo. 3. c. 53. s. 11.

Purchase money, how to be raised.

Stat. 7 Geo. 4. c. 66. s. 1.

Who can sell messuages, &c. for the purposes of the foregoing statute.

Stat. 1 & 2 Vict. c. 106. ss. 70 & 71.

Where new buildings are necessary for the residence of the incumbent, the bishop may purchase any conveniently situated house, and a certain portion of land.

Buildings and lands to be conveyed to patron in trust for the incumbent for the time being.

Stat. 1 & 2 Vict. c. 23. s. 9.

House of residence and buildings may be purchased with money or stock belonging to a benefice, in the hands of the governors of Queen Anne's Bounty.

Stat. 1 & 2 Vict. c. 23. s. 14.

(1) *Vide* stat. 7 Geo. 4. c. 66. s. 1.

(2) *Vide ante*, tit. *MORTGAGE*.

(3) *Ibid.*

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In case of purchase, the powers of stat. 7

Geo. 4. c. 66. will apply. •

Stat. 43 Geo. 3. c. 107. & stat. 7 Geo. 4. c. 66.

Land or tithes, houses of residence, and buildings may be purchased with appropriated money.

Stat. 43 Geo. 3. c. 108. s. 1.

Persons can, by deed or will, give lands, not exceeding five acres, or goods, and chattels, not exceeding 500*l.*, to promote the objects of stat. 43 Geo. 3. c. 108.

Stat. 55 Geo. 3. c. 147. s. 6.

Land, to the extent of twenty acres, may be purchased.

56 Geo. 3. c. 52. s. 1.

Money arising from sale of timber, how to be applied

Stat. 55 Geo. 3. c. 147. ss. 12 & 13.

Who can convey.

Stat. 1 & 2 Vict. c. 107. s. 9.

all corporations and persons under legal disabilities can convey to the incumbent of the living any house and offices or other premises which the governors of Queen Anne's Bounty may think fit to purchase.

By stat. 43 Geo. 3. c. 107. & stat. 7 Geo. 4. c. 66. land or tithes, houses of residence and buildings may be purchased with appropriated money, or stock belonging to a benefice in the hands of the governors of Queen Anne's Bounty.

By stat. 43 Geo. 3. c. 108. s. 1. every person (extended by stat. 51 Geo. 3. c. 115. to the Crown) having in his own right any estate or interest in possession, reversion, or contingency, of or in any lands or tenements, or of any property, of or in any goods or chattels, can by deed or will give and grant to, and vest in any person, or body politic or corporate, and their heirs and successors respectively, all his estate in such lands or tenements, not exceeding five acres, or goods and chattels, or any part or parts thereof, not exceeding in value 500*l.*, for or towards the erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the liturgy and rites of the Established Church are or shall be used or observed, or any mansion house for the residence of any minister, officiating or to officiate in any such church or chapel; or of any outbuildings, offices, churchyard, or glebe for the same respectively.

By stat. 55 Geo. 3. c. 147. s. 6. the parson, vicar, or other incumbent for the time being, of any ecclesiastical benefice, perpetual curacy, or parochial chapelry, the existing glebe whereof does not exceed five statute acres, with the consent of the patron and bishop, can purchase any lands not exceeding in the whole twenty statute acres, with the necessary outbuildings thereon, whether being within the local limits of the benefice, perpetual curacy, or parochial chapelry, or not, but so as that the same be situate conveniently for building a parsonage or a glebe house, and outbuildings, and for gardens and glebe thereof, or for any such purposes, and for actual residence and occupation by the incumbent thereof, such land being of freehold tenure, or being copyhold of inheritance, or for life or lives, holden of any manor or lordship belonging to the same benefice, perpetual curacy, or parochial chapelry; and which lands so purchased are for ever to be annexed to and for the glebe of such benefice, perpetual curacy, or parochial chapelry, to be held by such incumbent and his successors, without any licence or writ of *ad quod damnum*; and if such lands, before such annexation, be of copyhold tenure, they are after such annexation to be of freehold tenure.

By stat. 56 Geo. 3. c. 52. s. 1. a power is given to the incumbent of any benefice with consent of patron and bishop to apply money arising from sale of timber for or towards the exchange or purchase of parsonage house or glebe lands.

By stat. 55 Geo. 3. c. 147. ss. 12 & 13. all persons, tenants in fee simple, and all corporations sole and aggregate, and all persons under legal disabilities, can sell and convey to the incumbent any lands not exceeding in the whole, if belonging to an owner in fee simple, twenty acres, and in all other cases not exceeding five acres, with the necessary outbuildings thereon, for the true value thereof.

By stat. 1 & 2 Vict. c. 107. s. 9. all the powers given by stat. 58 Geo. 3.

c. 45. for enabling the bodies politic and persons therein mentioned to convey, and the commissioners to take, land for the sites of churches and chapels, or shall extend to the transfer by sale or exchange only of land for a site for a house of residence of any incumbent, if the same do not exceed five acres.

By stat. 8 & 9 Vict. c. 70. s. 20., "in every case in which land or other hereditaments belonging to an incumbent in right of his church shall be sold and conveyed by him to the Church Building Commissioners, and in which the purchase money is, under stat. 58 Geo. 3. c. 45., directed to be paid into the Bank of England, or invested in the names of trustees, such purchase money shall, instead of being paid into the Bank of England, or invested in the names of trustees, be paid to the governors of the Bounty of Queen Anne for the augmentation of the maintenance of the poor clergy, and be appropriated by the governors to the benefice to which the land or other hereditaments so sold shall have belonged, and shall be applicable and disposable by the governors to and for the benefit and augmentation of such benefice, in such and the same manner, and with such and the same powers of investment in the purchase of land, and exchange for other land and hereditaments, and otherwise, and with other powers and authorities, in all respects, according to the rules, orders, and constitutions for the time being in force for the management of the Bounty of Queen Anne, as if the money so appropriated had been originally provided or appropriated by the governors out of the funds at their disposal, for the benefit and augmentation of the same benefice."

By stat. 8 & 9 Vict. c. 70. s. 21., money payable to the governors of the Bounty of Queen Anne must be paid to their treasurer for the time being; and the persons so paying such money will be discharged from all liability, and trusts relating thereto.

By stat. 8 & 9 Vict. c. 70. s. 19. it will not be necessary to pay into the Bank of England any sums of money to be paid for any lands or hereditaments to be purchased or acquired by virtue of the Church Building Acts, although the same may amount to or exceed 200*l.* (unless the Ecclesiastical Commissioners shall require such sums to be paid into such bank), but the same may be invested in the names of trustees, as is provided in the cases when the amount thereof shall be under the sum of 200*l.*; and in any declaration of trust to be made of any such monies the commissioners may make such special provisions for its investment and the appointment of new trustees, as they think fit.

Form of the deed of purchase of buildings or lands to be annexed to the benefice:—

This indenture, made the — day of —, in the year of our Lord —, between A. B. of — of the one part, the right reverend father in God — lord bishop of —, and E. F. of —, patron of the rectory, &c. of — of the other part: whereas there is no fit parsonage house belonging to the said rectory, &c.; and whereas a contract hath been made, by the direction of the said bishop, with the said A. B., for the absolute purchase of the house, and lands hereinafter described, for the price or sum of — pounds, pursuant to the directions of an act passed in the second year of the reign of her majesty Queen Victoria, intitled "An Act to abridge the holding of

PURCHASES.

Five acres of land may be purchased through the Church Building Commissioners, as a site for a house of residence.

Stat. 8 & 9 Vict. c. 70 ss. 20, 21 & 19.

The purchase money of lands sold under stat. 58 Geo. 3. c. 45., and belonging to an incumbent in right of his living, may be paid to, and applied by, the governors of Queen Anne's Bounty, for the benefit of the incumbent.

Such purchase money to be paid to the treasurer of Queen Anne's Bounty, whose receipt shall be a valid discharge.

The purchase money of land need not be paid into the Bank of England, but may be paid to trustees.

PURCHASES.

benefices in plurality, and to make better provision for the residence of the clergy; now this indenture witnesseth, that the said A. B., in consideration of the sum of — pounds to him in hand paid for the purchase aforesaid, the receipt of which sum the said A. B. hath admitted by an endorsement on the back of this deed, hath granted, bargained, and sold, and by these presents doth grant, bargain, and sell unto the said E. F. and his heirs all, &c. [here insert a full description of the buildings or lands so intended to be conveyed, with their and every of their rights, privileges, and appurtenances], to hold unto the said E. F. and his heirs or successors [as the case may be] in trust for the sole use and benefit of the incumbent of the said benefice and his successors, rectors, vicars, &c. [as the case may be] of the said benefice for the time being for ever. [Usual covenants for title to be added.] In witness, &c.

QUARE IMPEDIT.

1. GENERALLY, pp. 1107—1110.

Writ of right of advowson and of darrein presentment, abolished by stat. 3 & 4 Gul. 4. c. 27. s. 36. — Where two patrons present to one and the same church, by several titles — Where a living is vacant, the patron is bound to present within six calendar months — Entry of caveat — Right of presentment is a temporal right, and a temporal inheritance — What words in a statute will create a chapel of ease presentative and not donative — Judgment of Chief Justice Tindal in REG. V. FOLEY (CLERK).

2. STATUTES, pp. 1110—1114.

STAT. 13 EDW. I. ST. I. C. 5. — Three original writs of advowson — Usurpations of churches during particular estates, not to prejudice those in reversion — Presentations to churches of women during their coverture — Churches of religious persons — Judgments given not to be reversed, but by writ of error or attainr — The defendant pleadeth plenarty of his own presentation — Presentations to a church by composition — The remedy for a disturbance after a particular estate ended — Damages in quare impedit and darrein presentment — Quare impedit of prebends, vicarages, hospitals, &c. — Usurpation by one coparcener upon another — STAT. 7 ANNE, C. 18. — To preserve the rights of patrons to advowsons — STAT. 3 & 4 GUL. 4. C. 27. SS. 30—36. — No advowson to be recovered but within three incumbencies, or sixty years — Incumbencies, after lapse, to be reckoned within the period, but not incumbencies after promotions to bishoprics — When person claiming an advowson in remainder, &c. after an estate tail shall be barred, &c. — No advowson to be recovered after 100 years — At the end of the period of limitation, the right of the party out of possession to be extinguished — Receipt of rent to be deemed receipt of profits — Real and mixed actions abolished, except for dower, quare impedit, and ejectment.

3. THINGS FOR WHICH QUARE IMPEDIT MAY BE BROUGHT, p. 1114.

4. WHAT A SUFFICIENT SEISIN TO MAINTAIN QUARE IMPEDIT, pp. 1115—1117.

Presentation always necessary — Where a church has been appropriated time out of mind — A presentment by lapse by the ordinary — Sufficient presentation for a reversion — Presentment by the bishop — Not competent for the bishop to dispute the title of the patron, at least before collation — Where the donee of a donative is disturbed — EVIDENCE OF TITLE — Surrender of livings by a bishop to the Crown — Agreement by the

Crown to grant certain livings — Recognition of ancient grant — Collation to a living at a particular time — Returns made by a bishop to writs from the Exchequer — Original collation from the registry of the bishopric — Effect of an objection that documents were not admissible for a particular purpose.

5. WHERE QUARE IMPEDIT DOES NOT LIE, p. 1117.

6. BY WHOM OR AGAINST WHOM QUARE IMPEDIT LIES, pp. 1117—1120.

By the crown — Must be by him who is in possession of an advowson of the church — Where the patron must lay the last presentation in his ancestor — Where there is an usurpation in the time of the vacancy of the bishopric, archdeaconry, or rectory — One coparcener upon an agreement to present by turns — Husband disturbed in presenting to an advowson, which he has in right of his wife — Distinct patrons and incumbents — Distinct patrons of an advowson in one and the same church — Several plaintiffs who vary in their titles — Where tenants in common make composition to present by turns —
AGAINST WHOM QUARE IMPEDIT MAY BE BROUGHT.

7. COSTS, pp. 1120, 1121.

Stat. 4 & 5 Gul. 4. c. 39. — When a bishop exempted from costs by certificate of the Court, under stat. 4 & 5 Gul. 4. c. 39. — Judgment of Chief Justice Tindal in EDWARDS v. EXETER (BISHOP OF).

8. PRACTICE, pp. 1121, 1122.

9. EFFECT OF JUDGMENT, pp. 1122, 1123.

10. WRITS OF NE ADMITTAS, QUARE INCUMBRAVIT, AND JUS PATRONATUS, pp. 1123—1126.

1. GENERALLY.

GENERALLY.

If a patron be prevented from exercising his right of presenting his clerk to a benefice, or disturbed in his right of presentation, a writ of quare impedit lies to redress such wrongs.

Formerly a writ of right of advowson and of darrein presentment lay, but by stat. 3 & 4 Gul. 4. c. 27. s. 36. no writ of right of advowson, nor of darrein presentment, and no other action real or mixed except for dower, quare impedit, or ejectment, and no plaint in the nature of any writ or action can now be brought.

Writ of right of advowson and of darrein presentment abolished by stat. 3 & 4 Gul. 4. c. 27. s. 36.

If two patrons present to one and the same church by several titles, the church is litigious, because the bishop knows not which has the rightful title; as when the bishop admits the clerk of the one, he puts the other out of possession, and the bishop becomes a disturber, if he who is put out of possession have a better title. (1)

Where two patrons present to one and the same church, by several titles.

Upon the vacancy of a living, the patron is bound to present within six calendar months, or the benefice will lapse to the bishop; but if the presentation be made within that time, the bishop is bound to admit and institute the clerk if found sufficient, unless the church be full, or there be notice of any litigation.

Where a living is vacant, the patron bound to present within six calendar months.

(1) Degge's P. C. by Ellis, 13.

GENERALLY.

Entry of
caveat.

Right of pre-
sentment is a
temporal right
and a temporal
inheritance.

If opposition be intended, it is usual for each party to enter a caveat with the bishop, to prevent the institution of his antagonist's clerk; but to this caveat the temporal courts pay no regard, viewing a caveat as a mere nullity. (1)

Therefore, on the delay or refusal of the bishop to admit his clerk the patron brings his suit in the temporal courts, called quare impedit, against the bishop for the temporal injury done to his property, in disturbing him in his presentation; for the right of presentment is a temporal right and a temporal inheritance; and hence the right of presentation, and to determine who ought to present and who not, and at what time, belongs to the king and his temporal courts. (2)

In quare impedit there is no general issue involving the question of the right to present; but being a possessory action, the plaintiff must show an actual seisin by presentation, by himself, or by some person through whom he claims. (3)

What words in
a statute will
create a chapel
of ease presen-
tative and not
donative.

Questions have frequently arisen, under a quare impedit, whether a church was presentative or donative. (4) *Reg. v. Foley (Clerk)* (5) will, however, illustrate what words in a statute will create a chapel of ease presentative and not donative. A private act of parliament — after providing for a sale of glebe land, and the erection of an additional church with part of the proceeds — directed, that the curate of the new church should, during the incumbency of A. the then rector, be appointed by him; and that after the death, avoidance, or resignation of A., the new church should become the principal church, with all the accustomed rights, immunities, and privileges appertaining to a mother church; and the then church should become and be deemed a chapel of ease thereto, to be served by a minister capable of having cure of souls; and that “the patronage of or right of presentation to the chapel, as well as the patronage of or right of presentation to the new church, should be vested in the patron of the rectory, his heirs and assigns, so nevertheless that the minister of the chapel should not be removable at pleasure:” — It was held, that the chapel of ease thus created by the act, was thereby made presentative and not donative; and it seems, that if it had been at first donative, it would have ceased to be so, upon a presentation being once made by the patron to the ordinary, followed by the institution and induction of the presentee; Chief Justice Tindal observing, “The real question in this case appears to me to be, whether, upon the true construction of the act of parliament, this chapel, which before was the old parochial church of Kingswinford, is a donative, to which the patron may appoint, without presenting his clerk to the ordinary; or whether it is presentative only, as is contended on the part of the Crown. Looking at the general scope and object of the act, it appears to me that it is presentative only. The object of the act appears to have been this: part of the glebe land having mines under it, which might be worked with advantage if in lay hands, it provided for the sale thereof if a purchaser could be found; and, accordingly, the patron enters into a contract with the incumbent, that a certain portion of the land shall be sold to the former for the sum of 19,290*l.* 11*s.* 3*d.*, and that, after payment of certain expenses, the remainder of the

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Tindal in *Reg.
v. Foley (Clerk)*.

(1) *Hichin v. Glover*, 1 Rob. 111. 5 Black. Com. 246.

(2) Doctor and Student, 218.

(3) *Meath (Bishop) v. Winchester (Mar-*

quis), 1 Alcock & Napier (Irish), 538.

(4) *Vide ante*, tit. ADVOWSON — DONATIVE — PRESENTATION.

(5) 2 C. B. 664.

purchase money shall be considered and taken as part of the rectory ; that, after defraying thereout the expenses of erecting a new rectory house and outbuildings, and setting apart a sum not exceeding 1929*l.* 1*s.*, to be applied towards the erection of a new church, the final residue shall be invested for the benefit of the rectory. The act then provides, that, in case such new church shall be built by the means and within the time specified, the curate or officiating minister thereof, who shall, during the life or incumbency of Mr. Hinde, the then rector, be appointed by him to act during his life or incumbency, shall be paid or allowed the sum of 100*l.* per annum, over and above the pew-rents of the new church. The act then goes on to provide for the enjoyment of the future patronage in these words: ‘And from and after the death, avoidance, or resignation of the said N. Hinde, the said new church shall become the principal or mother church of Kingswinford aforesaid, with all the accustomed rights, immunities, and privileges appertaining to a mother church; and the then church shall become and be deemed a chapel of ease thereto, to be served by a minister capable of having cure of souls; and the patronage of or right of presentation to the same chapel, as well as the patronage of or right of presentation to the said new church, shall be vested in Lord Dudley and Ward, his heirs and assigns, patron and patrons of the said rectory of Kingswinford, notwithstanding that the minister of the said chapel shall not be removable at pleasure.’ These are the important words to which we are now called upon to give a construction. What is the meaning of the words, ‘the patronage of or right of presentation to the same chapel, as well as the patronage of or right of presentation to the said new church, shall be vested in Lord Dudley and Ward, his heirs and assigns?’ The same words are applied equally to the old church and to the new chapel of ease; and it seems to me to be very difficult to put a different construction upon them in the one case from that which is put upon them in the other. And this remark is the more striking, when the earlier part of the clause, where it is provided that the curate or officiating minister of the newly built church shall during the life or incumbency of Mr. Hinde, the then rector, be appointed by him to act during his life or incumbency. If the legislature had intended the creation of a donative, it would be somewhat singular that they should, when dealing with the future patronage, drop that word, and adopt a form of expression applicable to a totally different state of things, viz. ‘right of presentation.’ This view is still further confirmed by a consideration of the nature and the mode of creation of donatives. In Co. Litt. 344. (a) it is said, ‘If the king doth found a church, hospital, or free chapel donative, he may exempt the same from ordinary jurisdiction,’ &c. Again, ‘As the king may create donatives, exempt from the visitation of the ordinary, so he may, by his charter, license any subject to found such a church or chapel, and to ordain that it shall be donative and not presentable, and to be visited by the founder and not by the ordinary; and thus began donations in England, whereof common persons were patrons.’ If, therefore, this were intended to be a donative, one would expect to find some words of special exemption. In the ordinary case of a donative, the original deed would be presumed to be lost; but then there would be the circumstance of the donee never having been presented to the bishop. But here we have the very act creating the living, and if it were exempted from

GENERALLY.

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Chief Justice
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GENERALLY.

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ordinary jurisdiction, some words of exemption would undoubtedly be found. I was at first inclined to attach some importance in favour of the defendant's argument, to the words that declare 'that the minister of the said chapel shall not be removable at pleasure.' But I think these words were merely introduced *ex majori cautela*, lest the previous words should be construed to render the officiating minister appointed by Mr. Hinde during his incumbency removable at his pleasure. Upon the whole, the true construction of the act appears to me to be, that the chapel of ease is presentative by the patron of the living of the parish; and this construction is in some degree fortified by the circumstance, that the only instance that has occurred since the avoidance of Mr. Hinde, is of a presentation. I therefore think there should be judgment for the Crown."

STATUTES.

2. STATUTES.

Stat. 13 Edw. 1.
st. i. c. 5. s. 1.
Three original
writs of ad-
vowson.

Usurpations of
churches
during par-
ticular estates
not to prejudice
those in rever-
sion.

Presentations
to churches of
women during
their coverture.
Churches of
religious
persons.

The law respecting quare impedit is chiefly founded upon and originates with Stat. Westm. 13 Edw. 1. st. i. c. 5. (1), which after reciting that of advowsons of churches there be but three original writs, that is to say, one writ of right and two of possession, which, be darrein presentment and quare impedit; and hitherto, it hath been used in the realm, that when any having no right to present, had presented to any church, whose clerk was admitted, he that was very patron could not recover his advowson but only by a writ of right, which should be tried by battail or by great assize, whereby heirs within age, by fraud or else by negligence of their wardens, and heirs both of great and mean estate, by negligence or fraud, of tenants by the curtesy, women tenants in dower, or otherwise for term of life or for years, or in fee-tail, were many times disinherited of their advowsons, or at least (which was the better for them) were driven to their writ of right, in which case hitherto they were utterly disinherited, enacts "that such presentments shall not be so prejudicial to the right heirs, or to them unto whom such advowsons ought to revert after the death of any persons; for as often as any, having no right, doth present during the time that such heirs are in ward, or during the estates of tenants in dower, by the curtesy or otherwise, for term of life or of years, or in tail, at the next avoidance, when the heir is come to full age, or when after the death of the tenants before named the advowson shall revert unto the heir being of full age, he shall have such action by writ of advowson possessory as the last ancestor of such an heir should have had at the last avoidance happening in his time, being of full age before his death, or before the demise was made for term of life, or in fee-tail, as before is said; that the same shall be observed in presentments made unto churches, being of the inheritance of wives, what time they shall be under the power of their husbands which must be aided by this statute by the remedy aforesaid. Also religious men, as bishops, archdeacons, parsons of churches, and other spiritual men, shall be aided by this statute in case any, having no right to present do present unto churches belonging to prelacies, spiritual dignities, parsonages, or to houses of religion, what time such houses, prelacies, spiritual dignities, or parsonages be vacant.

(1) *Vide* Stephens' Ecclesiastical Statutes, 13. in not.

“ Neither shall this act be so largely understood that such persons for whose remedy this statute was ordained shall have the recovery aforesaid, surmising that guardians of heirs, tenants in tail, by the curtesy, tenants in dower, for term of life or for years, or husbands, faintly have defended pleas moved by them, or against them ; because the judgment given in the king’s courts shall not be annulled by this statute, the judgment shall stand in his force until it be reversed in the court of the king as erroneous, if error be found ; or by assize of darrein presentment, or by inquest, by a writ of quare impedit if it be passed, or be annulled by attain or certification, which shall be freely granted. And from henceforth one form of pleading shall be observed among justices in writs of darrein presentment and quare impedit ; in this respect, if the defendant allegeth plenarty of the church of his own presentation, the plea shall not fail by reason of the plenarty, so that the writ be purchased within six months, though he cannot recover his presentation within the six months. And sometimes, when an agreement is made between many claiming one advowson, and enrolled before the justices in the roll, or by fine in this form, that one shall present the first time, and at the next avoidance another, and the third time another ; and so of many, in case there be many. And when one hath presented, and had his presentation, which he ought to have according to the form of their agreement and fine, and at the next avoidance he to whom the second presentation belongeth is disturbed by any that was party to the said fine, or by some other in his stead : it is provided, that from henceforth they that be so disturbed shall have no need to sue a quare impedit, but shall resort to the roll or fine. And if the said concord or agreement be found in the roll or fine, then the sheriff shall be commanded, that he give knowledge unto the disturber, that he be ready at some short day, containing the space of fifteen days or three weeks (as the place happeneth to be near or far), for to show if he can allège any thing, wherefore the party that is disturbed ought not to present. And if he come not, or peradventure doth come, and can allege nothing to bar the party of his presentation, by reason of any deed made or written since the fine was made or enrolled, he shall recover his presentation with his damages. And where it chanceth that after the death of the ancestor of him that presented his clerk unto a church, the same advowson is assigned in dower to any woman, or to tenant by the curtesy, which do present ; and after the death of such tenants, the very heir is disturbed to present when the church is void : it is provided, that from henceforth it shall be in the election of the party disturbed whether he will sue a writ of quare impedit or of darrein presentment. The same shall be observed in advowsons demised for term of life, or years, or in fee-tail.

“ And from henceforth, in writs of quare impedit and darrein presentment, damages shall be awarded ; that is, to wit, if the time of six months pass by the disturbance of any, so that the bishop do confer to the church, and the very patron loseth his presentation for that time, damages shall be awarded for two years’ value of the church ; and if the six months be not passed, but the presentment be deraigned within the said time, then damages shall be awarded to the half year’s value of the church ; and if the disturber have not whereof he may recompense damages, in case where the bishop conferreth by lapse of time, he shall be punished by two years’ im-

STATUTES.

Stat. 13 Edw. 1. st. i. c. 5. ss. 2 & 3.

Judgments given not to be reversed but by writ of error or attain.

The defendant pleadeth plenarty of his own presentation.

Presentations to a church by composition.

The remedy for a disturbance after a particular estate ended.

Sect. 3. Damages in quare impedit and darrein presentment.

STATUTES.

Stat. 13 Edw.
1. st. i. c. 5.
ss. 4 & 5.
Quare impedit
of prebends,
vicarages,
hospitals, &c.

Sect. 5.
Usurpation by
one coparcener
upon another.

STAT. 7 ANNE,
c. 18.
To preserve the
rights of patrons
to advowsons.

STAT. 3 & 4
GUL. 4. c. 27.
ss. 30—36.
No advowson
to be recovered
but within
three incum-
bencies, or
sixty years.

Sect. 31.
Incumbencies
after lapse to
be reckoned
within the
period, but not
incumbencies
after pro-
motions to
bishoprics.

prisonment; and if the advowson be deraigned within the half year, yet the disturber shall be punished by the imprisonment of half a year.

“And from henceforth writs shall be granted for chapels, prebends, vicarages, hospitals, abbeys, priories, and other houses, which be of the advowsons of other men, that have not been used to be granted before. And when the parson of any church is disturbed to demand tithes in the next parish by a writ of indicavit, the patron of the parson so disturbed shall have a writ to demand the advowson of the tithes being in demand; and when it is deraigned, then shall the plea pass in the court christian, as far forth as it is deraigned in the king's court.

“When an advowson descendeth unto parceners, though one present twice, and usurpeth upon his coheir, yet he that was negligent shall not be clearly barred, but another time shall have his turn to present when it falleth.”

If the true patron omitted to bring his action within six months, the seisin was gained by the usurper; and the patron, to recover it, was driven to the long and hazardous process of a writ of right: to remedy which it was further enacted by stat. 7 Anne, c. 18., that no usurpation shall displace the estate or interest of the patron, or turn it to a mere right; but that the true patron may present upon the next avoidance, as if no such usurpation had happened.

By stat. 3 & 4 Gul. 4. c. 27. s. 30. no person shall bring any quare impedit (1) or other action, or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely (2) to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies will make up the full period of sixty years.

By sect. 31., when on the avoidance (3), after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift (4) of the patron thereof, a clerk shall be presented or collated thereto by his majesty (5) or the ordinary (6) by reason of a lapse (7): such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation, or gift of such patron as aforesaid; but when a clerk shall have been presented by his majesty upon the

(1) *Quare impedit*:—Vide Booth on Real Actions, 223. Stephens on Nisi Prius, 2928—2932. tit. STATUTES OF LIMITATION.

(2) *Obtained possession thereof adversely*:—Where the parties do not claim under the same title, the title of one is not consistent with that of the other; and the party claiming has, in contemplation of law, been deprived of his right, and it has not been acknowledged by the other party. Mansel on Limitation, 163.

(3) *When on the avoidance*:—Vide *Watson's case*, Dyer, 347. (a).

(4) *Presentation or gift*:—Vide 1 Inst. 344. (a).

(5) *Collated thereto by his majesty*:—*Earl v. Canterbury (Archbishop of)*, Cro. Car. 354.

(6) *Or the ordinary*:—The bishop in his diocese. *Wrighton v. Proctor*, 3 Lev. 211.

(7) *By reason of a lapse*:—Where on omission by the patron to present a clerk, the ordinary may (*jure devoluto*) present. *Catesby's case*, 6 Co. 61. (b).

avoidance of a benefice in consequence of the incumbent thereof having been made a bishop (1), the incumbency of such clerk (2) shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop.

Statutes.

Stat. 3 & 4 Gul.
4. c. 27.

By sect. 32., in the construction of that act, every person claiming a right to present to or bestow any ecclesiastical benefice as patron thereof, by virtue of any estate, interest, or right (3) which the owner of an estate tail in the advowson (4) might have barred (5), shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action, or suit shall be limited accordingly.

Sect. 32.

When person claiming an advowson in remainder, &c. after an estate tail, shall be barred.

By sect. 33. no person shall bring any quare impedit or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession (6) of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest (7), or undivided share (8), or alternate right of presentation (9) or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other persons entitled in respect of an estate, share, or right, held or derived under the same title.

Sect. 33.

No advowson to be recovered after 100 years.

By sect. 34. at the determination of the period limited by the act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished. (10)

Sect. 34.

At the end of the period of limitation the right of the party out of possession to be extinguished.

By sect. 35. the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of the act. (11)

Sect. 35.

Receipt of rent to be deemed receipt of profits.

(1) Having been made a bishop. — This right in the queen can only be exercised during the lifetime of the party so promoted. *Deming (Archbishop of) v. Attorney-General*, 10. P. C. 418.

(2) The incumbency of such clerk. — Vide stat. 13 & 14 Car. 2. c. 4.

(3) Or right. — Vide stat. 3 & 4 Gul. 4. c. 27. s. 15. *In re Wood*, 3 M. & C. 266.

(4) Advowson. — Vide s. 1 s. 2. (b). *Le case de Fines*, 3 Co. 87. (a).

(5) Might have barred. — Vide stat. 3 & 4 Gul. 4. c. 27. s. 4. *Mouth (Bishop of) v. Rochester (Mayor of)*, 1 Scott, 361. 3 Bur. N. C. 18.

(6) Obtained possession. — Vide *Green's case*, 6 Co. 29.

(7) Interest. — Vide 1 Inst. 922. (b).

(8) An undivided share. — As of joint tenancy. *Wilson v. Kestel*, 7 Bro. P. C. 266, or tenants in common. 2 Rel. Abr. *Presentation (K)*, 372. pl. 1.

(9) Or alternate right of presentation: — As in coparceners. Stat. Westminster 2. c. 5. Bro. Abr. *Quare impedit*, pl. 118. 2 Rel. Abr. *Presentation (I)*, 346. pl. 2. *Larker v. London (Bishop of)*, 1 Hen. Black. 12.

(10) Shall be extinguished. — This means "wholly destroyed," and operates thus: — If A. have possession of land for twenty years uninterruptedly, and then B. gains possession, upon which A. brings an action of ejectment, even though he is the claimant, yet his former possession for twenty years will be a good title for him to recover under, because a right in the adverse party has been tolled thereby. *Stocker v. Lenny*, 2 Ld. Raym. 741; et vide *Rex v. Carpenter*, 6 A. & E. 791.

(11) Receipt of the profits of the land for the purposes of this act. — Vide *Doe d. Davy v. Oxenham*, 7 M. & W. 132.

STATUTES.

Stat. 3 & 4 Gul.
4. c. 27. & 36.
Real and
mixed actions
abolished
except for
dower, quare
impedit, and
ejectment.

By sect. 36. no writ of right patent (1), writ of right quia dominus remittit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationabilibus divisio, writ of right of ward, writ de consuetudinibus et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonio, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or in reverter, writ of assize of novel disseisin, nuisance, darrein presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion (2), writ of entry sur alienation dum fuit non compos mentis, dum fuit infra ætatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præterit or causa matrimonii prælocuti, writ of aiel, besaiel, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, writ of disceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, or writ per quæ servitia, and no other action real or mixed (except a writ of right, of dower, or writ of dower unde nihil habet, or a quare impedit, or an ejectment), and no plaint in the nature of any such writ or action (except (3) a plaint for freebench or dower), shall be brought after December 31. 1834.

THINGS
FOR WHICH
QUARE IMPEDIT
MAY BE
BROUGHT.

3. THINGS FOR WHICH QUARE IMPEDIT MAY BE BROUGHT.

Quare impedit lies for a church, an hospital, or a donative: and the writ must be quod permittat ipsum præsentare ad ecclesiam, but the plaintiff must set forth the special matter in his declaration.

By the equity of the Statute of Westminster, it lies for prebends, chapels, or vicarages (4); but in the case of a prebend, it must have been brought in the county where the cathedral was, and have been præsentare ad præbendam, or if of a vicarage, it must be præsentare ad vicariam. (5)

This suit lies also for a free chapel held by the king's patent; or by any person who, by the king's licence, makes a parochial church presentable. In the case of a prerogative turn, the writ is general, quæ ad nostram donationem spectat; and though the declaration be ad suam donationem spectat jure prerogativæ, yet that is no variance. (6)

(1) *Writ of right patent*: — Where this writ will still lie, as in the cases provided for in sect. 38., the demandant must in his count allege, and by his evidence prove, a seisin in his ancestor within sixty years. *Dumday v. Hughes (Bart.)*, 3 Bing. N. C. 439. 4 Scott, 209.

(2) *Writ of entry sur intrusion*: — Vide *Piercy v. Gardner*, 3 Bing. N. C. 748. 4 Scott, 512.

(3) *Except*: — Where a bill in equity is

brought on such a judgment, to correct errors in it, a demurrer will be allowed, if more than twenty years have elapsed since the right to the property accrued. *Plunkett v. Burlington (Lord)*, 1 Jurist, 376.

(4) *Rex v. Stafford (Marquis of)*, 3 T. R. 649. 1 Inst. 344. (a). 2 Rol. Abr. *Presentment (A)*, 380. pl. 2.

(5) *Merrick's case*, Dyer, 194. (a).

(6) *Rex & Reg. v. London (Bishop of)*, 2 Salk. 559.

Free chapel
held by the
king's patent.

4. WHAT A SUFFICIENT SEISIN TO MAINTAIN QUARE IMPEDIT.

A plaintiff must show an actual seisin to maintain quare impedit, and allege a presentment by himself, his ancestor, or some person under whom he claims.

A presentation is always necessary to maintain this action, except in some special cases; as if a man found a church, and before he presents he is disturbed, he may maintain a quare impedit without proving a presentation, by showing the special matter.

If a church have been appropriated time out of mind, and the appropriation be dissolved, so that the church reverts to the heir of the first founder; he may, if he be disturbed, show the special matter, and maintain a quare impedit, without showing a presentation. (1)

A presentment by lapse by the ordinary is a sufficient seisin.

If the grantee of the next avoidance present, and if then the heir of the grantor grant the next subsequent avoidance, that presentment is sufficient for the second grantee, because the presentment of the grantee of the next avoidance is sufficient for the grantor and his heirs. If a tenant for years present during the term (2), or if a lessee for life, or a tenant at will, or guardian during the wardship present, that is sufficient for the person in reversion. (3)

A presentment by the bishop as patron is sufficient for the king to maintain quare impedit to the church, when the temporalities come into the hands of the king by the vacancy of the bishopric, and a presentation by the father is sufficient for the wife of the son, tenant in dower thereof; and also for the second husband in right of the wife.

It is not competent for the bishop to dispute the title of the patron, at least before collation (4): thus, where, in quare impedit, the count stated that the plaintiff was admitted, &c. into the rectory of S. L., and so, being incumbent of the church, afterwards accepted and was admitted, &c. into the vicarage of O. P., the vicarage and rectory being respectively each of them a benefice with cure of souls; whereby it then and there belonged to the plaintiff as patron to present to the church of S. L.; and that he did present to the late bishop one W. B., a fit person in that behalf, but the bishop refused to admit him. The defendant (the bishop) pleaded, that, before the church of S. L. became vacant after the plaintiff accepted and was admitted, &c. into the vicarage of O. P., as in the declaration mentioned, and before the plaintiff presented W. B. in the declaration mentioned, the plaintiff conveyed to one J. H. the advowson, &c. in S. L.:—It was held, first, that the plea was bad on demurrer, for that it was not competent to the bishop to dispute the title of the patron, at least before collation. Secondly, that, to avoid the first living, it was not necessary that it should appear on the face of the count that it was of the value of 8*l.* a year, or more, in the king's books. Thirdly, that the patron being himself the incumbent, no sentence of deprivation was necessary to render the first living void.

WHAT A SUFFICIENT SEISIN TO MAINTAIN QUARE IMPEDIT.

Presentation always necessary.

Where a church has been appropriated time out of mind.

A presentment by lapse by the ordinary.

Sufficient presentation for a reversioner.

Presentation by the bishop.

Not competent for the bishop to dispute the title of the patron, at least before collation.

(1) *Reynoldson v. Blake*, 1 Ld. Raym. 201.

(2) *Brediman's case*, 6 Co. 57. Bro. *Quare Impedit*, pl. 129.

(3) Bro. *Quare Impedit*, pl. 139.

(4) *Apperley (Clerk) v. Hereford (Bishop of)*, 3 M. & Sc. 102. 9 Bing. 681. *Hulton (Clerk) v. Cove (Clerk)*, 1 B. & Ad. 538.

WHAT A SUFFICIENT SEIZIN TO MAINTAIN QUARE IMPEDIT.

Where the donee of a donative is disturbed.

EVIDENCE OF TITLE.

Surrender of livings by a bishop to the Crown.

Agreement by the Crown to grant certain livings.

Recognition of ancient grant.

Collation to a living at a particular time.

Returns made by a bishop to writs from the exchequer.

Original collation from the registry of the bishopric.

It would seem, that if the donee of a donative be disturbed after admission, a mandamus will lie to restore him, the right being merely temporal, and the remedy by trespass, ejectment, or money had and received, not being specific; but if quare impedit will lie by the disturbed donor or donee after admission, a mandamus will not be granted, as it is a general rule, that the Court never grant a mandamus where there is another specific remedy at law. (1) Nevertheless, a distinction may perhaps be taken between the case where the donee had been in possession prior to the institution of a stranger's clerk, and where a presentation had been made by a stranger before the donation; and it might be contended that, in the latter case, a quare impedit is the proper and peculiar remedy.

In a quare impedit, where the Bishop of Derry claimed the right of patronage of a living in the county of Londonderry, which was within the diocese of Derry, a surrender made by a former bishop to the Crown, of all the livings in that county, was tendered in evidence. This surrender was coupled with a grant by the Crown, dated two days afterwards, of the livings which had been so surrendered. Taken together, these documents were held to be admissible in evidence; and as the grant recited that all the livings in the county had anciently belonged to the see, such evidence was, for the purpose of proving the title of the bishop, received as an admission by the Crown of that fact. (2)

Before the date of the grant, the Crown had entered into articles of agreement with persons now represented by the governor and assistants of the Irish Society, to grant to them the livings in the county of which the living in question was named as one:—It was held, that this agreement did not prevent the grant from being receivable in evidence, however its value might be thereby affected. (3)

Two letters from the Crown to two successive bishops of Derry, directing them to perform the covenants and directions contained in the grant, were tendered in evidence as recognitions by the Crown of its previous grant:—It was also held, that they were admissible for this purpose. (4)

Entries in the books kept at the First Fruits Office are admissible to show the fact of a collation to a living made by the bishop at a particular time. (5)

Returns made by the bishop, in obedience to writs from the exchequer, requiring him to state the vacancies of, and presentations and collations to, the livings in his diocese, are admissible in evidence as statements made by a public officer in the discharge of a public duty. Though such returns may contain statements of a kind unusual in such documents, which statements were in favour of the right of the bishop who made them, they are nevertheless admissible, provided that the statements are within the scope of the inquiry in the writ. (6)

An original collation from the registry of the bishopric, and appearing on the face of it to be pleno jure, is admissible to show, that the right claimed has in fact been exercised. (7)

(1) *Box v. Chester (Bishop of)*, 1 T. R.

399. *Box v. Stafford (Marquis of)*, 3 Ibid.

659. *Box v. Bedford Lord (Corporation of)*, 6 East, 367.

(2) *The Irish Society v. Derry (Bishop of)*, 12 C. & F. 461.

(3) Ibid.

(4) Ibid.

(5) Ibid.

(6) Ibid.

(7) Ibid.

An objection was taken that certain documents tendered in evidence were not admissible for a particular purpose. The Court decided that they were admissible. An exception was taken to this decision: and it was also held, that if the documents were admissible on any ground, the exception could not be sustained. (1)

In such a case a Court of Error can only look at the record, and decide upon the propriety of the ruling, as therein stated. (2)

WHAT A SUFFICIENT TITLE TO MAINTAIN QUARE IMPEDIT.

Effect of an objection that documents were not admissible for a particular purpose.

5. WHERE QUARE IMPEDIT DOES NOT LIE. (3)

WHERE QUARE IMPEDIT DOES NOT LIE.

The grantee of the next avoidance cannot have the writ for a disturbance by a bishop's collating without a title, for want of notice in the life of the grantor, where the collation was before the grant; for the grantor who had a right to a quare impedit had but one thing in action which could not be granted over, as *nemo potest alicui transferre aliquod remanente in actione*; and this collation was good against every body but the true patron, and would be good against him but for the default of notice, for which the patron had a remedy, but not his grantee. (4) For although a collation is but a provision for the celebration of divine service, and no plenarty by collation can be pleaded against the true patron, yet a plenarty by collation did at common law put him who had a right to collate out of possession. (5) Nevertheless executors may have a quare impedit for a disturbance in the line of the testator by the equity of stat. 4 Edw. 3. c. 7.

If there be a presentment to an appropriation by a stranger, and the clerk be inducted, yet the patron of the appropriation cannot have a quare impedit, because he cannot be put out of possession. (6) Nor, as it is said, does it lie of an archdeaconry, as it is not local, but only a matter of function; but, on the other hand, an archdeacon has *locum in curia*. (7)

Judgment on demurrer was given for a defendant who was patron of a living where a fine had been levied and where no entry had been made to avoid it, because the parties to the fine had nothing in the advowson. (8)

6. BY WHOM OR AGAINST WHOM QUARE IMPEDIT LIES.

BY WHOM OR AGAINST WHOM QUARE IMPEDIT LIES.
By the Crown.

Quare impedit is a possessory action, and may be brought by the king in right of his crown, or on a title by lapse by a common person, or by several who have the same title, or by an executor or administrator.

To maintain the action, however, there must be a disturbance. It then lies by him who, being in possession of an advowson of a church, is disturbed in the presentation: as by a purchaser who may allege a presentation

Must be by him who is in possession of an advowson of the church.

(1) *The Irish Society v. Derry (Bishop of)*, 12 C. & P. 641.

(2) *Ibid.*

(3) *Quare impedit*, 1107-1114.

(4) *Wentworth's case*, 5 Co. 102. (a).

(5) *Bonwell's case*, 6 ibid. 50.

(6) *Smalwood v. Coventry (Bishop of)*, Cro. Eliz. 277.

(7) *Ibid.* 141. 207.

(8) *Wentworth v. Llandaff (Bishop of)*, 2 Wils. 234.

By WHOM OR
AGAINST WHOM
QUARE IM-
PEDIT LIES.

Where the
patron must
lay the last
presentation
in his ancestor.

Where there is
an usurpation
in the time of
the vacancy of
the bishopric,
archdeaconry,
or rectory.

One coparcener
upon an
agreement to
present by
turns.

Husband dis-
turbed in pre-
senting to an
advowson
which he has in
right of his
wife.

in him from whom he purchased the same (1); by the grantee of the next avoidance against the patron who granted it (2); by a husband, when the church of his wife becomes void during the coverture; by an infant claiming by descent, during his minority, notwithstanding his ancestor purchased and never presented to the advowson (3); or a feme covert after the death of her husband; by the chapter against the dean of their several possessions; or by an executor, for a disturbance in the time of the testator.

If a stranger usurp upon a tenant for life, by the courtesy, in dower, in tail, or upon tenant for years, by demise of the ancestor, the heir, if he be disturbed on the next avoidance, may present, or may bring his quare impedit, in which he must lay the last presentation in his ancestor, and pass over the usurpation, because by the Statute of Westminster it is to be counted as none to this purpose.

So if there be an usurpation in the time of the vacancy of the bishopric, archdeaconry, or rectory; in all these cases the usurper has gained the inheritance by wrong, and the statute will not revest the right, but only gives a possessory action to remove the incumbent. (4)

One coparcener, upon an agreement to present by turns, may have this action against another coparcener, who disturbs her in presenting in her turn (5); and if a clerk donative be disturbed, the patron may have a quare impedit of the church donative, and the writ must say quod permittat ipsum præsentare ad ecclesiam, &c., and the special matter must be stated in the declaration. (6)

Where the plaintiff in a quare impedit claimed the second turn to a living, but in his declaration did not lay any presentation made by him, or any of his predecessors in the second turn: and also acknowledged a title in the defendant to the first turn, but did not particularly set out the conveyances by which he derived it: this declaration was held to be insufficient to maintain the plaintiff's action. (7)

If a husband be disturbed in presenting to an advowson in right of his wife, and die, the wife may have a quare impedit of that disturbance; so may a guardian in socage of a manor to which an advowson is appendant

(1) *Rex v. Llandaff (Bishop of)*, 2 Str. 1007. *Tuflon (Sir J.) v. Temple (Sir R.)*, Vaugh. 7. *Thrule v. London (Bishop of)*, 1 Hen. Black. 376. 530.

(2) 2 Rol. Abr. *Presentment* (O), 375. pl. 1.

(3) 2 Inst. 358, 359. 1 Ibid. 351. (a). *Brokesbyes' case*, Owen, 85.

(4) *Boswell's case*, 6 Co. 50. F. N. B. 34. (X). *Stanhope v. Lincoln (Bishop of)*, Hob. 237.

(5) Bro. *Quare Impedit*, 139.

(6) 1 Inst. 344. (a).

(7) *Shireburne v. Hitch (in error)*, 1 Bro. P. C. 110.

In pleading a right in coparceners to present to an advowson by turns, it is good to state that such right arose because they did not agree to present. *Thrule v. London (Bishop of)*, 1 Hen. Black. 376.; *et vide Rex v. Stafford (Marquis of)*, 3 T. R. 646.

In quare impedit by a party claiming to present in the fourth turn in the right of

one of four coparceners, it is sufficient to allege a presentation by the ancestor, under whom all the coparceners claimed. Where a declaration alleged that the advowson had descended to the four coparceners, and they not agreeing to present jointly on the first vacancy, the elder sister presented; and afterwards, on two subsequent vacancies, that A. B. and C. D. presented in right of the second and third sisters respectively:—It was held, that it was to be presumed, that those presentations were by right and not by usurpation, and therefore did not turn the estate of the coparceners into a mere right; and that quare impedit was maintainable by a grantee of the fourth coparcener. (*Gully v. Exeter (Bishop of)*, 10 B. & C. 584. 2 M. & R. 276.) It was likewise held, that it was not necessary for the plaintiff, claiming to present in the fourth turn in right of the youngest sister, to show that the presentations in the turns of the other sisters were made by right. *Ibid.*

under his own name, though he cannot make any account for it. (1) If the ancestor suffer a person to appropriate the advowson, and die after the six months pass, and that the heir suffer another six months to pass, he may present, and can maintain quare impedit. (2)

If there are distinct patrons and incumbents, so that the church is divided into moieties, the quare impedit must be præsentare ad medietatem ecclesiæ; but in such case it may also be præsentare ad ecclesiam, because the half is but as one church to him (3); and if the right of nomination be in one, and that of presentation in another, the quare impedit will lie by the person having the nomination against the person who has the presentation and obstructs the right. (4)

So where there are distinct patrons of an advowson in one and the same church, as where one has the first portion and another the second, he who is disturbed may have a quare impedit præsentare to such a part; but he must declare that he was seised of the advowson of that part, and not allege that he was seised generally; for, if he do, the action will abate. (5)

If there are several plaintiffs, and they vary in title, the writ abates.

If tenants in common make composition to present by turns, the plaintiff in his count must mention the composition before it is executed; and in every case where the plaintiff shows a right to present by turn, he ought regularly to show how such a right commenced, whether by prescription, composition, or otherwise (6); and it may commence between parceners, joint tenants, and tenants in common, by record, or by deed. (7)

If a person grant that the grantee shall name a clerk, and that the grantor shall present him to the ordinary, the grantee may sue the patron. But if he grant that the grantee shall name two, and that he shall present one, then the grantee cannot sue the patron, as he has his election. (8)

Where in quare impedit the defendant pleaded that one M. O., under whom he claimed, being seised in fee of one moiety of the advowson to present to one turn in every two turns, presented one J. O., in her proper turn; that the church being afterwards vacant, one J. W., under whom the plaintiff claimed, presented in his proper turn; that the church being again vacant, the plaintiff presented; and that the church being a fourth time vacant, it belonged to the defendant to present: on demurrer to this plea, the Court of Common Pleas held that the defendant had not shown a title to present, since he had not shown whether the third presentation was by usurpation or by agreement, and that it could not be presumed that the defendant was entitled to present in the first and fourth turn, and the defendant in the second and third, since the plea averred that M. O. had presented to the first turn in her proper turn, and J. W. in his proper turn. (9)

By whom or
against whom
Quare Im-
pedit lies.

Distinct
patrons and
incumbents.

Distinct
patrons of an
advowson in
one and the
same church.

Several plain-
tiffs who vary
in their titles.

Where tenants
in common
make composi-
tion to present
by turns.

(1) Bro. *Baron and Feme*, 28. 41.

(2) Bro. *Quare Impedit*, 141.

(3) *Smith's case*, 10 Co. 136. *Windsor's case*, 5 *Ibid.* 132. *Hollande's case*, 4 *Ibid.* 75. 1 Inst. 18. (a).

(4) *Rez v. Stafford (Marquis of)*, 3 T. R. 651. *Rast.* 506. (b).

(5) *Rez v. Stafford (Marquis of)*, 3 T. R. 646.

(6) *Com. Dig. tit. Pleader* (3 J 4). *Dyer*, 2. (a).

(7) *Salisbury (Bishop of) v. Phillips*, 1 Salk. 49.

(8) Bro. *Quare Impedit*, 133.

(9) *Birch v. Lichfield and Coventry (Bishop of)*, 3 B. & P. 444. et vide *Greenwood v. London (Bishop of)*, 1 Marsh. 292. 5 Taunt. 797.

Scuttle, that if it had appeared by the plea that the plaintiff had presented to the third turn by usurpation, he would still have been entitled to the fourth turn by right. *Ibid.*

BY WHOM OR
AGAINST WHOM
QUARE IM-
PEDIT LIES.

—
AGAINST WHOM
QUARE IMPE-
DIT MAY BE
BROUGHT.

If the delay of presentation arise from the bishop alone, as upon a pretence of incapacity, or the like, then he only is named in the writ; but if there be another presentation set up, then the pretended patron and his clerk are also joined in the action; or it may be brought against the patron and clerk, leaving out the bishop; or against the patron only.

But it is most advisable to bring it against all three; for, if the bishop be left out, and the suit be not determined till the six months are past, the bishop is entitled to present by lapse, as he is not a party to the suit (1); but if he be named, and there has been a disturbance before the action, no lapse can possibly accrue till the right is determined. (2) If the patron be left out, and the writ be brought only against the bishop and the clerk, the suit is of no effect, and the writ will abate (3), for the right of the patron is the principal question in the cause. If the clerk be left out, and has received institution before the action brought (as is sometimes the case), the patron by this suit may recover his right of patronage, but not the present turn: for he cannot have judgment to remove the clerk, unless he be made a defendant and party to the suit, to hear what he can allege against it. For which reasons it is always safer to insert all three in the writ.

Nevertheless, where the patron is not disturbed, and has no prejudice by the suit, it may be against the incumbent alone; as in quare impedit by simony of the incumbent. (4) So in quare impedit by him who had the nomination to a church in the presentation of an abbot, which came to the king, and he presented a clerk, without any nomination, the quare impedit was against the incumbent alone, as the king cannot be a disturber. (5)

It was formerly doubted whether the patron, who is the disturber, ought to be named in the writ, as the naming him seems immaterial; besides that the incumbent, who is the disturber, is always in possession, and is easily known; but it may be difficult to find out who presented him; but if the patron be not named in the writ, the incumbent may plead it in abatement, though the ordinary cannot have that plea, because his acts do not depend on the patron's rights. (6)

COSTS.

7. COSTS.

Stat. 4 & 5
Gul. 4. c. 39.

By stat. 4 & 5 Gul. 4. c. 39. in all actions of quare impedit, where a verdict shall pass for the plaintiff, in addition to the damages, he shall have judgment to recover his full costs against the defendant therein, to be assessed and levied in the same manner as costs in personal actions; and if in any such action the plaintiff discontinue or be nonsuited, or a verdict be had against him, the defendant can have judgment to recover his full costs and charges against the plaintiff.

(1) *Lancaster v. Lowe*, Cro. Jac. 93.

(2) *Brickhead v. York (Archbishop of)*, Hob. 201.

(3) *Elcis (Sir W.) v. York (Archbishop of)*, ibid. 315.

(4) *R v. York (Archbishop of)*, 3 Lev. 16.

(5) *Dyer*, 48. (a).

(6) *Elcis (Sir W.) v. York (Archbishop of)*, Hob. 316. *Brickhead v. York (Archbishop of)*, ibid. 200. *Sarile (Sir G.) v. Thornter*, Cro. Jac. 651.

A bishop, defendant in quare impedit, who fails upon demurrer, may be exempted from costs by certificate of the Court, under stat. 4 & 5 Gul. 4. c. 39. Thus in *Edwards v. Exeter (Bishop of)* (1) Chief Justice Tindal observed, "I think this rule must be discharged. The earlier statute, 3 & 4 Gul. 4. c. 42., gives costs to the successful party upon a judgment on demurrer, in all actions. It is clear, therefore, that quare impedit is included. Then comes the statute 4 & 5 Gul. 4. c. 39., which in the enacting part gives the plaintiff in quare impedit his costs where he succeeds upon verdict, and the defendant upon a nonsuit or discontinuance; provided 'that no judgment for costs shall be had against any archbishop, bishop, or other ecclesiastical patron or incumbent, if the judge who shall try the cause, or if there shall be no trial by a jury, the court in which judgment shall be given, shall certify that such archbishop, bishop, or other ecclesiastical patron or incumbent, had probable cause for defending such action.'

Costs.

When a bishop exempted from costs by certificate of the Court under stat. 4 & 5 Gul. 4. c. 39.

Judgment of Chief Justice Tindal in *Edwards v. Exeter (Bishop of)*.

"The question is, whether this proviso extends to the former statute and judgments on demurrer, or is limited to cases of verdict for the plaintiff. What is there to limit it? the terms of the proviso are sufficiently large to comprehend judgment on demurrer, and no reason can be assigned for the restriction proposed; it is as just that the bishop should receive the protection of the court on demurrer as on verdict; and if so, why should not the clause be interpreted as in other cases, where there are several statutes *in pari materia*?

"Then as to the question whether the bishop had probable cause for defending the action, in a case which we took time to consider, it might be permitted to the bishop to doubt."

8. PRACTICE.

PRACTICE.

The writ of quare impedit lies only in the Common Pleas, except it be for the king, who can bring it either in the Common Pleas or King's Bench. (2) It issues out of Chancery, and must be brought within six months after the vacancy happens, and in the county where the church is, otherwise plenarty is a sufficient bar thereto; but except there be plenarty, there does not seem to be any limitation to the action.

Courts from which, the writ of quare impedit will be issued

The process in quare impedit is by summons (3), attachment, and distress; therefore, where the plaintiff proceeded by summons, to which nihil was returned; then by attachment, which recited that the defendant had been summoned; and then by distringas, under which the sheriff was ordered to levy 40s.; the proceedings were held to be irregular. (4)

The process is by summons, attachment, and distress.

Where in quare impedit against three, two of the defendants were summoned upon a writ returnable on the 8th of January, 1834, and appeared on the 11th; but the sheriff having returned nihil as to the third defendant, an alias quare impedit was issued against him, returnable on the 15th of April, 1834, on which he was summoned and appeared. A joint declaration

(1) 6 Bing. N. C. 146.

(3) *Searl v. Long*, 2 Mod. 265.

(2) Plowd. 244. F. N. B. 32. *Rex v.*

(4) *Tyrell (Sir J.) v. Jenner*, 6 Bing. 283.

Port (Archbishop of), 1 A. & E. 394. in not. 3 M. & P. 648.

PRACTICE.

When defendants make default.

Summons should be tested the day it issues.

The new rules do not extend to real actions.

The church may be described with an alias.

Writ may be general and count special.

When pleas will be struck out.

Replication when bad.

against the three defendants was delivered on the 10th January, 1835: it was held that, as to two of the defendants, the cause was out of court. (1)

If there are two defendants and one does not appear upon the first return, the plaintiff can have judgment and a writ to the bishop. (2) If the defendants make default, there can be judgment against all.

By stat. 53 Hen. 3. c. 12. there ought, in quare impedit, to be a return fifteen to twenty-one days before the return. If a longer period be given by consent, it should appear by record. (3) The summons should be tested the day it issues, that there may be no prejudice in respect of lapse.

The new rules do not extend to real actions, but to such proceedings only in which the three courts of Westminster exercise a concurrent jurisdiction; but the declaration in quare impedit must be delivered within twelve months of the return of the writ; and the twelve months are to be reckoned from the return day, and not from the time of appearance; the object of this rule being, that suits should not be kept alive an unreasonable time after the parties are in court. (4)

The declaration must set forth how the church became void, i.e. by death, resignation, or deprivation; and it has been held, that, in quare impedit, the declaration may describe the church with an alias, though the writ did not. (5)

It has been questioned whether there can be more than one count in a declaration in quare impedit (6); but the writ may be general, and the count special. (7)

In quare impedit, the plaintiff in his declaration set out his title to advowson, commencing in 1603, and which was principally founded on a deed of 1672. The defendants claimed under a subsequent deed, executed by the same party in 1692, and traversed every material allegation in the declaration, in forty-three several pleas. The Court of C. P. after a nonsuit and a rule absolute for a new trial, rescinded the original rule to plead several matters, and ordered twenty-two pleas to be struck out, and eventually confined the defendant to only two, which went to dispute the validity of the deed of 1672. (8)

Where in quare impedit, the plaintiffs alleged that they, being the majority of certain persons entitled under a custom, nominated W. C. and the defendants pleaded, that they were the majority, and nominated E. P.; without this, that the plaintiffs were the majority: a replication, that the defendants did not duly nominate E. P., was held to be ill. (9)

EFFECT OF JUDGMENT.

9. EFFECT OF JUDGMENT.

He who has judgment in quare impedit, recovers the advowson as well as the presentment. But by the very judgment absolutely given, there is a

(1) *Barnes v. Jackson*, 1 Bing. N. C. 545.; vide etiam *Worley v. Lee*, 2 T. R. 112. *Cooper v. Nias*, 3 B. & A. 272.

(2) 2 Inst. 124, 125.

(3) Ibid.

(4) *Barnes v. Jackson*, 1 Bing. N. C. 548.

(5) *Salisbury (Bishop of) v. Philips*, 1 Ld. Raym. 535.

(6) *Shepherd v. Chester (Bishop of)*, 4 B. & P. 130. 6 Bing. 435.

(7) F. N. B. 33. (a).

(8) *Gully v. Exeter (Bishop of)*, 2 M. & P. 105. 4 Bing. 525.

(9) *Harrington (Earl of) v. Lichfield (Bishop of)*, 4 Bing. N. C. 77.

effect of the judgment, that the incumbent of the church when the writ was brought, if named in the writ, is actually removed; but if not named in the writ, he cannot be removed. (1) By stat. 13 Edw. 1. c. 30. the judge of nisi prius has power to give judgment immediately; yet if he do not, upon the return of the postea, judgment may be given by the court to which the return is made. (2)

EFFECT OF JUDGMENT.

Where in a quare impedit brought against A. and B. tenants in common of an advowson, being assignees of coparceners, who would not agree to present, A. suffered judgment by default, and B. died pending the writ; it was held, that this judgment was a bar to another quare impedit brought by A. and C. the representative of B. (in which A. was summoned and severed) to recover the same presentation; but that it was not a bar to C.'s right to recover on the next avoidance in his turn. (3)

Judgment by default.

If the plaintiff have judgment, there issues direct to the bishop a writ of admittendum clericum; if this writ be disobeyed, the plaintiff has his remedy for damages by quare non admisit, or after alias and pluries admittendum clericum by attachment. (4)

Writ of admittendum clericum.

Another effect of a judgment given in a quare impedit is, that he for whom the judgment is given shall recover as well his damages, as his presentment and advowson, by stat. 13 Edw. 1. st. i. c. 5. (5)

Damages and costs.

By stat. 3 Hen. 7. c. 10. if the defendant bring a writ of error, and judgment be affirmed, or the writ be discontinued, or defendant nonsuited, the plaintiff shall recover his costs and damages for his wrongful delay. By virtue of this statute, the Court of King's Bench have, upon a writ of error, awarded damages according to the value of the church found by the verdict; but as the real damage which the plaintiff sustains is only the being kept out of the half year's value, the legal interest on that seems to be all that he is entitled to. The king can have no damages in quare impedit, as he is not within the statute of Westminster. (6)

Stat. 3 Hen. 7. c. 10.

By stat. 4 & 5 Gul. 4. c. 39. full costs in addition to damages are recoverable, but no costs are to be given against an archbishop or bishop who had probable cause of defence; but where the defence is grounded upon former presentations or collations, it is not to be held probable cause.

Stat. 4 & 5 Gul. 4. c. 39.

It seems, that where the principal jury omit to inquire the damages, they can be supplied by a writ of inquiry. (7)

Writ of inquiry.

10. WRITS OF NE ADMITTAS, QUARE INCUMBRAVIT, AND JUS PATRONATUS.

WRITS OF NE ADMITTAS, QUARE INCUMBRAVIT, AND JUS PATRONATUS.

With respect to the writ of ne admittas, Mr. Justice Blackstone says, "Immediately on the suing out of the quare impedit, if the plaintiff suspects

(1) Watson's Clergyman's Law, 289.
Harris v. Austin, 3 Bulst. 38. Boswell's
v. 6 Co. 51. (b). Cort v. St. David's
(Bishop of), Cro. Car. 348.
(2) Barl. N. P. 123. (b).
(3) Barker v. London (Bishop of), 1 Hen.
Back 412. Willes, 659. Where quare
impedit does not abate by death of parties,
vide 2 Sid. 94. Yates v. Dryden (Sir J.),
Cro Car 589.

(4) F. N. B. 38. (c).
(5) Watson's Clergyman's Law, 292,
298.
(6) Bull. N P. 125. (b). Pembroke (Earl
of) v. Bostock, Cro. Car. 175. London
(Bishop of) v. Mercer's Company, 2 Str.
931.; and vide Holt v. Holland, Skin. 25.
3 Lev. 59.
(7) Herbert v. Waters, Carth. 362.

WRITS OF NE
ADMITTAS,
QUARE INCUM-
BRAVIT, AND
JUS PATRO-
NATUS.

that the bishop will admit the defendant," or any other clerk, pending the suit, he may have a prohibitory writ called a ne admittas, which recites the contention begun in the king's courts, and forbids the bishop to admit any clerk whatsoever till such contention be determined.

"If the bishop, after the receipt of this writ, admit any person, even though the patron's right may have been found in a jure patronatus then the plaintiff, after he has obtained judgment in the quare impedit, may remove the incumbent, if the clerk of a stranger, by a writ of scire facias."

The writ does not lie, if the plea be not depending in the king's courts.

The writ of ne admittas does not lie if quare impedit be not depending in the king's courts; and therefore there is a writ in the register directed to the chief justice of the Common Pleas, to certify to the king in his Chancery if there be any plea before him and the other judges, between the parties: and until this was done the writ was not granted. But the writ ne admittas may be issued out of the Chancery, before the king is certified that the plea of quare impedit is depending, and then the party grieved can require the chief justice to certify. (1)

WRIT OF QUARE
INCUMBRAVIT
abolished by
stat. 3 & 4
Gul. 4. c. 27.

The writ of quare incumbravit being a real action, has been abolished by stat. 3 & 4 Gul. 4. c. 27.; and it would seem, that there is no necessity for a ne admittas, where all proper parties have been made defendants in the quare impedit; for if the bishop be a defendant, no lapse can occur pendente brevi (2); and if the clerk, then, though he was admitted prior or pending the quare impedit, he is removed by the mere effect of the judgment in that action (3); and as to any person who has been admitted, and is no party to the quare impedit, he may be removed, unless his title be good, by a writ of scire facias, founded on the judgment in quare impedit. (4)

WRIT OF JUS
PATRONATUS.

Where a person presents his clerk to the bishop within the six months and another presents his clerk, so that the church becomes litigious; the desire of the parties the bishop may issue a writ called jus patronatus to inquire to whom the right of patronage belongs.

By whom
issued.

This writ may issue out of Chancery to the ordinary, who is to make an inquiry thereon, and who should admit that person in whom the right is found by the verdict, and certified to be by the commissioners, although he be even found and certified against the true patron, as the ordinary will be thus excused, and no disturber.

Although the
right be found
for one party,
the bishop may
receive a con-
trary clerk.

Although the right be found for one party, yet the ordinary may, to his peril, receive a contrary clerk: but, according to Hobart, since there is a provision merely for the good and safety of the ordinary, and he pretends doubt, and therefore puts the patron to this inquiry, charge and delay, to satisfy and secure him, he ought to judge and receive the clerk according to the verdict; for though it be but an inquest of office, and therefore binds not the patron, yet the patron cannot impute disturbance to the ordinary, who ought therefore to follow it, for to these purposes it is final, and cannot be tried again. (5)

(1) F. N. B. 32. 37. 84. Degge's P. C. by Ellis, 16.

(2) Watson's Clergyman's Law, 112.

(3) Ibid. 289, 290.

(4) 3 Black. Com. by Stephen, 661. not.

(5) *Ellis (Sir W.) v. York (Archbishop of)*, Hob. 318.

If the jury be equally divided, or give a special verdict, or no verdict, or if there be a verdict in favour of each patron, in these cases, it seems, the bishop (inasmuch as he has done his duty) can refuse both, without subjecting himself either to an action on the case, or to the peril of being deemed a disturber. (1)

Writs of Ne
Admittas,
Quare Incum-
bravit, and
Jus Patro-
natus.

If the bishop please, he can inquire of the right of every person that presents a clerk to him, by awarding a jus patronatus before he admits his clerk; and if in such case it be found that a stranger have the right, and that he present in six months, the ordinary must admit his clerk; but if he let the six months pass, the ordinary is obliged to admit the clerk of the disturber, and is thus barred of the benefit of lapse. (2)

Where the
jury are equally
divided.

Bishop can in
any case award
a jus patro-
natus.

The following, according to Dr. Watson, is the mode of proceeding, when a jus patronatus is awarded:— "The bishop doth proceed either by himself, or, and that more usually, by a commission made under his seal, to certain persons as best pleaseth him. If by commission, then it is done after this manner: the bishop doth appoint to sit in the void church on a certain day, and doth decree a monition against the patrons presenting, and the clerks presented, to be present there at the day appointed to see the proceedings. Also the bishop is to decree, and send forth a public edict against all having or pretending to have an interest or right of presenting to the vacant church, on the day and at the place appointed, to show their right, &c. And this public edict is to be affixed to the door of the void church in time of divine service. And against the day of appearance, certain articles are to be prepared, which are to contain the particulars about which the jury are to inquire; viz. 1. Whether the church be void, and how it became void. 2. Who presented at the last preceding avoidance, and to the two foregoing avoidances. 3. Whether the persons presenting, presented in their own right. 4. In whom the inheritance of the advowson is, and who ought to present to the void turn. 5. Whether any of the clerks presented be known, or suspected to be guilty of any crime, rendering him incapable of admission to the said benefice, as heresy, simony, &c.

Mode of pro-
ceeding when
a jus patro-
natus is
awarded.

"At the day appointed for this inquiry, the person or persons executing the aforesaid mandates or citations, are to make oath of the due execution thereof, or the execution of them may be certified on the back of the mandate, which must be done under some authentic seal, viz. of the archdeacon, commissary, or rural dean; against which day the bishop is also to summon a jury for this purpose, by way of citation, which jury is to consist of six clerks and six laymen that live near to the void church, and then the parties cited, and those of the jury are to be publicly called; and if any of the jury appear not, being duly summoned, they may be punished, that is, the clergymen by sequestration, the laymen by excommunication, and so compelled to appear; but lest any fail, it is best to summon more than the number of twelve, for that more, if the judge think fit, may be sworn of the jury, provided that there be an equal number of the lay and clergy. And if others cited appear not, they are to be pronounced contumacious, and the proceedings are to go on, however, and in præsum

(1) Gibson's Codex, 779. Degge's P. C. (2) Vide Gibson's Codex, 779.
by Ellis, 16.

Writ of Ne
Admittas.
Quare Inquit
Reavit. and
Jus Patron-
atus.

contumaciae of them who do not appear. If six clergy and six laymen appear to be of the jury, which is the competent number, they are to be sworn jointly to inquire of the articles, and in swearing them, first a clerk, then a layman is to be sworn, till a jury of twelve be made up. The jury being impanelled, the articles to be inquired of are to be publicly read and delivered to them, and then the parties or their counsel are to set forth their interests or titles, and produce their evidences to prove them. When the parties and their counsel have been fully heard, the jury may give their verdict at any time the same day, or, if the cause be doubtful, the judge may assign them a longer time to consider of the matter, and assign also a place where they shall give their verdict." (1)

Proceedings
after a verdict
found in
patronatus.

After a verdict found in jus patronatus, for the patron, the patron must again request the bishop to admit his clerk, otherwise, if the church lapse after six months, the bishop may collate. (2) But the Year Book of 34 Hen. 7. 12 (a) states that the clerk, and not the patron, is to make the request. The church may become again litigious, if, after a verdict given upon a jus patronatus, another clerk is presented by a patron, whose right was not discussed in the jus patronatus, before admission is requested of any clerk by him, for whom the verdict was found. In this case a new jus patronatus upon request must be awarded. But if one have presented, and his title be found upon a jus patronatus, and then requests the bishop to have his clerk admitted, and afterwards another presents, in this case it will be expedient for the bishop to admit the clerk of him for whom the verdict was found. (3)

RATES (CHURCH). (4)

1. GENERALLY, p. 1128.

2. WHO CAN, OR CANNOT, MAKE A RATE, pp. 1128—1158.

Rates to be made by churchwardens and parishioners after public notice — Customary sums — Rate made by churchwardens after it has been refused by the majority of vestry is illegal and void — Judgment of Lord Denman in BURDER v. VELEY — Whether the minority of a vestry can make a valid rate after the majority have refused, where Ecclesiastical Court has ordered a rate to be made — Judgment of Sir Herbert Jenner in VELEY v. GOSLING — Judgment of Lord Denman in GOSLING v. VELEY — Assent of parishioners to a rate will sometimes cure previous illegality or informality — Where churchwardens have authority to make a rate under the Church Building Statute — A rate for defraying the expense of the consecration of a church rebuilt, without assent, under stat. 59 Geo. 3. c. 134. s. 40. is valid — Judgment of Sir Herbert Jenner in WANNER v. GATER — A rate for the consecration of a church is one which it is incumbent on the parishioners to make — A select vestry appointed pursuant to stat. 59 Geo. 3. c. 134. s. 30. has no power to impose a rate for the repair of the district church — Judgment of Lord Tenterden in COCKBURN v. HARVEY — When a majority of

(1) Watson's Clergyman's Law, 236, 237.
(2) 1 Broom's B. L. 27.
(3) Ibid.

(4) Vide tit. CHURCH — MANDAMUS — PROHIBITION.

select vestry must attend to constitute a legal body — Rate drawn up by churchwardens alone.

RATE, WHEN TO BE MADE, pp. 1158—1160.

*Rate should be made before the expense is incurred — Under stat. 59 Geo. 3. c. 134. s. 14. churchwardens cannot raise a loan on the credit of the church rates, to pay a debt for repairs which was incurred in a past year — Judgment of Lord Denman in *REX v. DURSLEY (CHURCHWARDENS OF)* — Judgment of Lord Brougham in *PIGGOTT v. BEAR-BLOCK* — The repairs being authorised by the vestry meeting does not absolve the churchwardens from the consequences of neglecting to make a prospective rate — Court of equity will not decrees a retrospective rate to be made to reimburse a previous overseer for payments out of pocket — Spiritual Court cannot enforce a rate for reimbursement.*

PERSONS AND PROPERTY LIABLE TO BE ASSESSED, pp. 1160—1166.

*Residence or occupancy — Tenant, not owner, chargeable — Where inhabitants are liable to be assessed for incidental expenses, under stat. 58 Geo. 3. c. 45. ss. 70 & 71. — Stat. 17 Geo. 2. c. 37. — Disputed waste-lands near parishes — When it will be presumed that a chapel was coeval with a church, and that those who repaired the chapel were exempt from repairing the church — Judgment of Lord Denman in *CRIVEN v. SANDERSON* — Hall of a company — Governor of Greenwich Hospital — Omission of traders from rate — Persons not chargeable for land in another parish — Stall in a market — Exemptions of patrons and rectors — Inhabitants of a chapelry, how far exempted — Stat. 58 Geo. 3. c. 45. s. 31. — No division of any parish into separate parishes or district parishes, to affect poor or other parochial rates, church rates excepted.*

MODE OF ASSESSMENT, pp. 1166—1169.

*Rates a personal charge — Rule of assessment — Rates made upon the same assessment as the poor rate — Customs to be observed — Glebe lands — Lessees of a market — Omission in the rate of a person bound to pay *primâ facie* makes the rate unequal — Rate not invalid from omissions of an inconsiderable amount — Whether separate rate for ornaments — When a church rate is or is not excessive — Objections to rates are *stricti juris* — Acquiescence in the mode of rating — Aggrieved parties can appeal to ecclesiastical judge.*

WHERE A MANDAMUS WILL, OR WILL NOT, BE ISSUED, pp. 1169—1172.

*A mandamus will be granted to the inhabitants of a parish liable to contribute to a church rate to elect churchwardens — When a vestry or other parochial body will be compelled to make a rate — Where an act of parliament directs a body to levy church rates, they will be compelled to do so by mandamus — When the writ lies to churchwardens of the united parishes, under stat. 10 Anne, c. 11. — Money borrowed under Church Building Statutes — Trustees appointed under a local act, with power to make rates for building a new parish church, will be compelled by mandamus to account to parochial auditors, under stat. 1 & 2 Gul. 4. c. 60. — Except it be under the provisions of a statute, a mandamus will not be granted to churchwardens to compel them to make a rate — When the writ will not be granted to enforce a monition from the Consistory Court — Where affidavits do not show the exact amount of contribution — A rate to reimburse the churchwardens such sums as they had expended, or might expend, is bad on its face — When the writ will be refused to enforce payment of a church rate, under stat. 53 Geo. 3. c. 127. s. 7. — Judgment of Lord Denman in *REX v. SILLIFANT* — Select vestry will not be compelled to make a church rate, if the churchwardens refuse to state the necessary amount, or to furnish any estimate of it — Where a select vestry colourably adjourn to evade laying the rate.*

WHEN RATES CAN OR CANNOT BE ENFORCED IN THE ECCLESIASTICAL COURT, OR UNDER STAT. 53 GEO. 3. c. 127. pp. 1173—1193.

Monition to make a rate — Parishioners may be sued for non-payment of rates, in the Ecclesiastical Court — Extreme formality of description not requisite in a suit for rates — Rate ought to be confirmed by the ordinary — Causes of church rate may be removed by letters of request — When Court bound to proceed to the trial of a select vestry — Articles exhibited by two churchwardens against two other churchwardens and parishioners for refusing to make a rate, rejected — Where district churchwardens may be made the

*only respondents to an appeal — Irresponsibility of executor — Plaintiff's allegation must not go beyond the citation — Where a rate cannot be set aside on the ground of inequality — Illegal to raise more money than is requisite — Churchwardens voting against a rate not guilty of an ecclesiastical offence — Wilfully opposing a rate an ecclesiastical offence — Where custom pleaded — Where land assessed lies in another parish — Rate on Quakers — Where monition will not be issued to the party imposing the rate for the production of the parish books — Whether stat. 53 Geo. 3. c. 127. s. 7., which gives power to justices to enforce the payment of a sum not exceeding 10l. due upon a church rate, where neither the validity of the rate nor the liability of the party has been questioned, takes away the jurisdiction of the Ecclesiastical Court has been doubted — Object of the control which the Court of Chancery exercises over the Ecclesiastical Courts — Judgment of Lord Cottenham in *RE BAINES* — When the validity of the rate has not been questioned nor the liability of the party, the jurisdiction of the Ecclesiastical Court is taken away by stat. 53 Geo. 3. c. 127. s. 7.; but if the validity or liability be in question, the Ecclesiastical Courts have jurisdiction — Judgment of Lord Denman in *RICKETTS v. BODENHAM* — In prohibition the existence of a dispute under stat. 53 Geo. 3. c. 127. is a matter of practice determinable by the Ecclesiastical Court — Where a declaration sufficiently showed the absence of a dispute within stat. 53 Geo. 3. c. 127. s. 7. to oust the Ecclesiastical Court of jurisdiction — Judgment of Lord Denman in *RICHARDS v. DYKE* — The Spiritual Courts have power to construe a statute the effect of which comes incidentally before them in the form of a proceeding when they have jurisdiction — In a suit for subtraction of a church rate, under stat. 58 Geo. 3. c. 45. and stat. 59 Geo. 3. c. 134., the libel ought to show upon its face that the conditions required by the acts have been complied with — Judgment of Sir Herbert Jenner in *BLUNT v. HARWOOD* — Where there must be a majority of the entire number of the select vestry to make a valid church rate — Judgment of Mr. Justice Bayley in *BLACKET v. BLIZARD* — What is a good demand of the rate — Authority of justices, under stat. 53 Geo. 3. c. 127. & stat. 54 Geo. 3. c. 68. (I.) for non-payment of rates — Appeal to sessions — Ecclesiastical jurisdiction saved — Notice that the validity of the rate is disputed supersedes the authority of the justices — Preliminaries to issuing warrant — Exceeding authority of warrant — Distress made out of district — Stat. 3 & 4 Vict. c. 93. — Powers of ecclesiastical judge to discharge party in contempt — COSTS — Under the words "costs lawfully incurred by reason of the custody and contempt of such party" in stat. 3 & 4 Vict. c. 93., costs in the Ecclesiastical Court only are intended — Judgment of Dr. Lushington in *BAKER v. THOROGOOD* — Successful party will not be dismissed with his full costs, if he cause unnecessary expense — Retrospective church rate pronounced against with costs.*

GENERALLY.

1. GENERALLY.

In *Smith v. Keats* (1), Dr. Lushington observed, "Looking to the general principles upon which questions of church rate depend, there can, I think, be no doubt or difficulty in assuming that church rate has existed in this country from time immemorial; for there is no evidence that it was introduced at any particular period; nor can I find any distinct notice of its commencement."

By the laws and custom of the realm, the body of the church, the belfry, and all public and common chapels within or adjoining to the church are to be re-edified, maintained, and repaired at the charge of the parishioners and landholders within the parish. (2)

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Rates to be made after notice.

2. WHO CAN, OR CANNOT, MAKE A RATE.

Rates for the reparation of the church are to be made by the churchwardens, together with the parishioners assembled, upon public notice given in the church. The specific purpose of the meeting should be stated in the notice. (3)

(1) 4 Hagg. 278.

Stat. 58 Geo. 3. c. 69.

(2) Degge's P. C. by Ellis, 202.

In *Baker v. Wood* (1) it appeared that notice had been given of a meeting in vestry for the purpose of granting a church rate, and that if a poll should be demanded, that the meeting would be immediately adjourned to the town hall. The meeting being held and a poll demanded, the chairman immediately adjourned the meeting to the town hall, where the poll was taken: it was held, that the proceeding was regular, no business having been interrupted by it, and the adjournment being part of the original appointment; that the town hall was not an improper place to take the poll, by reason of its being private property, no person having been prevented from voting on that account; and that the time for taking the poll being limited to eleven hours, such time was sufficient if due diligence had been used, seven hundred and eighty-five persons being the greatest number proved to have voted on any occasion.

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Where a township, being part of a parish, is called upon by mandamus to pay a definite customary proportion of a church rate, laid for the whole parish, it must appear that the inhabitants of the township were summoned to consider the rate; for, if the custom require such summons, fulfilment of that requisite is essential, and if it do not, it is a bad custom. (2) But it seems that a notice of a vestry meeting, for making a church rate, may be given by a private parishioner. (3)

Customary
summons.

A rate made by the churchwardens after it has been refused by the majority of a vestry duly convened for the purpose of making a church rate for the necessary repairs of the church, is illegal and void.

Rate made by
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Thus, in *Burder v. Veley* (4) Lord Denman observed, "This case came before us on a demurrer to a declaration in prohibition, directed to the Judge of the Consistory Court of the Bishop of London, requiring him to proceed no further against the plaintiff for the recovery of a supposed church rate laid on the parishioners of Braintree by the churchwardens alone, notwithstanding the vote of a vestry by which the rate was refused.

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"The Consistory Court decided against this defence regularly pleaded, and has thereby raised the question, whether the churchwardens have power to impose a church rate against the declared will of the inhabitants in vestry assembled. In debating this question at the bar, the ancient doctrine, that by the custom of England, the inhabitants are bound to repair the body of the church and to inclose the churchyard, was not disputed; a doctrine fully stated by Holt (Chief Justice), as quoted by the queen's advocate in arguing the present case in the Consistory Court. 'By the civil and canon law, the parson is obliged to repair the whole church; and it is so in all christian kingdoms but in England; for it is by the peculiar law of this nation that the parishioners are charged with the repairs of the body of the church.' (5)

"This is undoubtedly a legal truth, as old as any in our books. Lord Coke, in his commentary on the statute or writ of *Circumspecte agatis* (6), and that on the *Articuli Cleri* (7), and in numerous other places, distinctly lays it down; and all the authorities are the same way; and though the

(1) 1 Curt. 507.

(2) *Regina v. Dalby*, 3 Q.B. 602.

(3) *East v. Frlowes*, 3 Curt. 680.

(4) 12 A. & E. 244, 264.

(5) *Hawkins v. Rous*, Carth. 360.

(6) 2 Inst. 489.

(7) Ibid. 653. The passage referred to appears to be that which is to be found in the comment on stat. 2 Edw. 6. c. 13. s. 4.

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period of the earliest church rate does not appear to be ascertained, we may safely assume that the expense required for this purpose was always defrayed by means of a rate levied on the parishioners. Neither was that proposition denied on the part of the plaintiffs, or that a church rate is matter of ecclesiastical cognisance, or that the churchwardens are entrusted with the expenditure of the rate so levied, and liable to spiritual censures for neglect of their duty therein. But the question is, whether, in case of refusal by the parishioners, the churchwardens are empowered to impose a rate for that purpose, and indeed, compellable by spiritual censures so to tax their fellow parishioners.

“If they have not this power, and are not subject to this liability, the defendants argue that there would be a wrong without a remedy; a striking argument no doubt; as that is an anomaly abhorrent to the law of England. The wrong is neglect of duty by parishioners; the remedy is supposed to be found in the power of their officers to tax them. But the history of ancient times establishes that the law did apply a remedy such as was found then, and was expected always to continue, amply sufficient to secure the reparation of churches; the proceeding by interdict, which suspended the performance of ecclesiastical rites in the refractory parish, or the proceeding by excommunication against every parishioner.

“Either of these penalties was too awful in itself, and in the suffering of those who incurred it, to fail of immediately producing the desired effect; or, more probably, the denunciation was alone equal to its purpose, and the mischief may never have existed in the earliest times. Perhaps also the force and efficacy of the remedy may account for the want of parliamentary provision, which could only have rested on the weaker sanctions of temporal power. The alteration of men’s opinions and feelings upon these subjects having deprived the old remedy of its virtue, we are to inquire whether the law has provided that other remedy which is now sought to be enforced. If not, extreme injustice towards the churchwardens is said to result; as they are confessedly bound to repair the church, and yet are provided with no means of performing that duty.

“This argument would also be entitled to the greatest consideration if the law subjected churchwardens to any personal inconvenience, as a consequence of the church remaining unrepaired, when destitute of the funds requisite for upholding the fabric, or supplying any of its wants to which a church rate is applicable. If, in such a state of things, they could be sued for injury done to a passenger on the highway by the decayed church wall coming down upon him, or indicted for a nuisance by its fall there, as has been surmised; if they could be punished for not laying out their own money in repairs; that law, if it also prohibited them from obtaining full indemnity from those whom, at the same time, it pronounces to be primarily liable, would be chargeable with manifest inconsistency and injustice. Such liabilities, indeed, if recognised by general usage, or even by a prevailing practice, for them to make advances to that end, would tempt us to imply from the custom of England, which charges the inhabitants with repair of churches, a power in the churchwardens to reimburse themselves from their neighbours’ funds, even though that power had never been exercised. But no instance has been found of a churchwarden being thus visited. On the contrary, numerous authorities in our reports establish the

proposition, that churchwardens can only be liable in respect of monies come to their hands ; and all that appears in the books of ecclesiastical law, with reference to the duties of those officers, is qualified by the supposition that the parish has furnished them with adequate resources. Nor have churchwardens been in the habit of making such advances.

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“The plaintiffs in this present suit have the right to cast the burden of proof on their adversaries. The law requires clear demonstration that a tax is lawfully imposed. No act of parliament vests in the parish officers such a power as these have exercised, or recites that such a power exists by common law or custom. No book of reports affirms it. No such usage, in fact, prevails in the land. An opposite usage prevails. The church rate is constantly imposed by the inhabitants in vestry assembled. In Gibson’s Codex, 220. (1) it is said, ‘ Rates for reparation of the church are to be made by the churchwardens, together with the parishioners assembled upon public notice given in the church. And the major part of them that appear, shall bind the parish ; or if none appear, the churchwardens alone may make the rate ; because they, and not the parishioners, are to be cited and punished, in defect of repairs.’

“Such is the form of the rate in all the books of practice. The assertion that no necessity has ever arisen for resorting to the power, because the consent of a majority of the vestry has never been wanting, is not merely gratuitous ; it is incredible. During so many ages, that it never once should have happened that churchwardens have wished to impose a church rate, when the majority of parishioners have wished otherwise, is a supposition that has no foundation but in fancy. The doctrine here laid down has received the sanction of the highest authorities in Westminster Hall. Chief Justice North lays it down, in *Rogers v. Davenant* (2), that the Spiritual Court may excommunicate every inhabitant, if the church is left unrepared, but yet can impose no tax.

“Let it be supposed (however improbable) that, during those vehement contests in the time of Charles II., when the parishioners’ refusal to raise a rate induced some of the bishops to appoint commissioners for that purpose, the churchwardens in every instance took part with the parish in their refusal ; if the churchwardens were amenable to the Spiritual Court for the non-repair of churches, and at the same time enjoyed the power of taxing the parish for the expense, nothing could have been more simple, direct, and complete, than the ordinary’s method of proceeding. He would have ordered the churchwardens to execute the needful repairs ; they, if competent, would have imposed the rate, or refusing, would have been excommunicated for disobedience of his lawful commands. But, instead of taking a course so entirely free from objection according to the law now contended for, the bishops created a new and unheard-of species of authority under the name of commissioners, to levy this rate for non-performance of a duty, which it is now contended, they might have enforced with perfect ease. If the mere necessity for doing an act could create a machinery for performing it, those commissions would have been lawful, for they would have obtained the object. But the attempt was pronounced unlawful, and abandoned.

(1) Vol. 1. p. 196.

(2) 1 Mod. 194. Sembl. S. C. *Anon.*
1 Freem. K. B. & C. P. 286.

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There was no need of making it, if the power now asserted were vested in the churchwardens; for that would have been equally effectual for its purpose, and the scandal of an unconstitutional encroachment would have been avoided. At that period, as well as at the great era of the Reformation, the subject underwent frequent discussion; yet this power is not asserted by any learned text writer, even on the ecclesiastical law.

“The cases cited on the argument were numerous; we have since carefully examined them all, but have found them for the most part to bear very imperfectly on the present question. We do not feel it necessary to add any comments upon them to the answer which they received at the bar, with one or two exceptions. An anonymous case (1) is reported in 1 Mod. Rep. ‘Moved for a prohibition to the Spiritual Court, for that they sue a parish for not paying a rate made by the churchwardens only; whereas by the law the major part of the parish must join. Twisden, Justice: Perhaps no more of the parish will come together. Counsel: If that did appear, it might be something.’ This is the whole report. It is no decision, and not even a dictum. If it were either, it could not affect the argument here; for it could but be made to apply to a refusal of the parish to meet for considering of a rate; and we are dealing with the facts that they have met, and considered, and refused.

“Another case (2), reported in the first edition of Ventris, is also anonymous, but is certainly not the same as that just cited, because that was in Michaelmas term, 22 Car. 2.; this in Trinity term, 35th year of the same reign. It is, in a later edition of Ventris, named *Thursfield v. Jones* (3), and is in these terms. ‘A motion for a prohibition in a suit in the Ecclesiastical Court for a churchwardens’ rate, suggesting that they had pleaded that it was not made with the consent of the parishioners, and that the plea was refused. The Court said, that the churchwardens (if the parish were summoned, and refused to meet or make a rate) shall make one alone for the repairs of the church (if needful), because that if the repairs were neglected, the churchwardens were to be cited, and not the parishioners; and a day was given to show cause why there should not go a prohibition.’ If this means no more than that, where the parishioners, being duly summoned, refuse to meet, the churchwardens may act as the parish meeting, this appears perfectly reasonable and just. In such case the churchwardens form the vestry, and to them the absent leave the management of parish affairs, acquiescing in their resolutions, not resisting and objecting to them. But, if it is to be understood as a declaration, that when the parishioners do attend and refuse to make the rate, the churchwardens may forthwith proceed to impose one, this would be a dictum standing alone; it was unnecessary for the judgment; it rests on no authority; it leads to no result in the particular case. It is such a remark as a reporter may have thought the judge adopted, when, on an *ex parte* statement of the law by counsel, he only granted his application; or, even if it were actually uttered by the Court in granting a rule to show cause, it is wholly insufficient for the erection of a new authority, inconsistent with the known practice. A further observation on this decision is, that the reason assigned for it is not correct, unless the churchwardens can be shown to be personally liable

(1) 1 Mod. 79.

(2) *Anon.* 1 Vent. 367.

(3) *Ibid.*

where they have no supplies; the contrary of which is true. Every search has been made among our records, and in the contemporary books of our officers, for some further particulars of those two cases; but none can be found.

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"It was supposed, in the argument, that Lord Stowell had on one occasion laid down the law favourably for defendant (1); but that short case, when examined, certainly bears no such import. It was an application for a monition to churchwardens to reinstate a fallen spire. The question was as to the form of the issue, whether it admitted the liability of the parish to reinstate. Lord Stowell thought it did, and directed the monition. 'But,' he added, 'for the protection of the churchwardens, they should be informed that they must make their rate before they commence their repairs.' It is clear that he had no idea of pointing out in what manner, or with whose concurrence, the rate was to be made.

"There is, however, a case of *Gaudern v. Silby* (2), in the Court of Arches, where the very point now before us came in question on appeal from the Consistory Court of Peterborough, and Sir W. Wynne expressly decided that, the vestry being called together to make the amendment, and refusing to make it, the law is, that, if the parishioners will not make the rate, the churchwarden has a right to make it himself.

"This decision of an ecclesiastical judge of admitted learning, caution, and ability, requires the more consideration, because it is evidently the cause of our being engaged in the present inquiry. Dr. Lushington, the judge whose further proceedings we are desired to prohibit, spoke thus of Sir W. Wynne's judgment, the authority of which was pressed upon him. (3)

"I may observe upon that case, that I believe its appearance was a surprise to the whole profession. It certainly was not known to the ecclesiastical commissioners, or, at least, not recollected by any member of that commission when the subject was there discussed; and during the thirty years that I have been in these courts I never knew that case adverted to, nor was I aware till lately, that such a case was in existence, although it is of forty years' standing.' And, afterwards (4), 'there are many parts in this case which, I do not hesitate to say, if I was a co-ordinate judge, would be a little startling to my mind;—the total absence of all authority having been stated on the one side or the other, — the total absence of any precedent in the Ecclesiastical Court,—all this would form a matter of the most weighty consideration in my mind, if I considered myself entitled to enter into the disposal of this case; but, be this as it may, this is a judgment deliberately pronounced by the dean of the Arches Court, which is the superior court to the one in which I am now sitting; the judgments of this court are submitted to the dean of the Arches, and may be overruled by him, and his decisions form that law which I am bound to administer. I consider, then, according to the principles I have stated, the decision in *Gaudern v. Silby* is a precedent binding upon my judgment; that I am, in obedience to that decision, bound to admit this libel. Whether that libel

(1) *Maynard (Lord) v. Brand*, 3 Phil. 501.

(3) *Braintree Church-rate case*, by Johnson, p. 78.

(2) *Braintree Church-rate case*, by Johnson, App. p. 103. 109.; also reported as *Gaudern v. Selby*, 1 Curt. 394.

(4) P. 85.

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be good law, or not, or what ought to be the law, without the precedent in question, I do not feel myself called upon to pronounce any opinion.'

"On the hearing of the present case before Dr. Lushington, that learned judge, interposing, pointed out many incongruities in the statement of facts in *Gaudern v. Silby* (1), saying that it teemed with eccentricity. It is tolerably clear that it was that case alone which induced him to decide the present case as he did. Sitting in the Consistory Court, he felt himself constrained by the decision of the Court of Arches, being a court of superior authority, to hold the present church rate legal and binding.

"An able pamphlet has been published since these remarks were made, reporting that case, and containing a statement of facts which appears to remove much of the eccentricity alluded to by Dr. Lushington.

"But the great fundamental objection remains in its full force. However binding on the Consistory Court, and however respectable in itself, an insulated and recent decision by the Court of Arches is not binding in Westminster Hall. The question on the effect of this single authority really is neither more nor less than this: Can the ecclesiastical judge make a law? If he only declared one, the sources of his information are equally open to us. If he drew his conclusions from reasoning, we may examine it, and must form our opinion on its force.

"But, in truth, so important and novel a doctrine was never promulged with so little effort to conciliate the concurrence of others. The point is not discussed at all; neither reason nor authority is vouched in its behalf. The proceeding wears the appearance of being *ex parte*; perhaps it had, in truth, become such by the withdrawal of opposition, which may be well explained by the smallness of the sum and the probable change in the inhabitancy, or the exhaustion of all means and spirit of resistance by a litigation protracted for years. With all respect due to the venerable person from whom this judgment proceeded, we are bound to declare that it does not appear to rest on principle, or to be admissible as authority.

"In the course of the argument in this place, it was hinted that Lord Stowell entertained an opinion favourable to a church rate like the present. He was supposed to have given advice, when at the bar, indicative of such views. From the great learning of that distinguished person, and his great familiarity with this peculiar branch of law, we thought his opinion at the bar might throw light upon the question, and, perhaps irregularly, availed ourselves of this chance of instruction. But we are bound to say, that after perusing the case and his opinion with care, they convey to us a directly opposite notion of the impression of Lord Stowell's mind, as to the validity of rates so imposed. The conclusion at which we arrive is, that the court christian was wrong in overruling the defensive allegation of the parishioners that the rate was made against the wishes of the majority in vestry assembled, on the ground that this supposed church rate was a nullity as having been made by persons who had no authority to make one in defiance of the declared dissent of the vestry; and that the Court decided erroneously in proceeding to give judgment for enforcing it.

"But even supposing the rate invalid, a second point was urged, that prohibition ought not to go from this Court to the court christian; the main

(1) *Braintree Church-rate case*, by Johnson, Append. 103. 109. S.C. 1 Curt. 394.

reason being that the latter has exclusive jurisdiction over the subject matter, which is said to be purely of ecclesiastical cognisance, and that appeal lies from the Consistory Court to the Court of Arches. We are thus called on to state the principles of the proceeding by prohibition.

"There is no title in our law under which, if we look to the facts appearing in the several cases, more confusion and contradiction may be found. If we were from these bound to lay down a practical rule for arranging, by classes, where the writ ought to be refused and where granted, the difficulties of the task might probably be found insurmountable.

"But the principle itself, however hard to apply, is clear. It is this; that, if any inferior (1) court will entertain a suit which appears by the libel in the outset, or is shown on the face of the proceedings to be beyond its jurisdiction, the courts of Westminster Hall have no discretion to award or refuse the writ, but are bound to award it.

"The case of *Home v. Camden (Earl)* (2) must always be resorted to for the learning on this head. That remarkable case gave birth to a controversy of full thirteen years' duration: the commissioners of prize appeals, overruling a decision of Sir James Marriot in the Court of Admiralty, had declared the capture of a Dutch vessel to have been made jointly by his Majesty's land and sea forces, and had issued their monition to the receiver of the prize money to come in and account for it with a view to dividing it accordingly. A prohibition was hereupon sued for in the Common Pleas, on the ground that the commissioners had misconstrued the act which regulated prizes made in the war with Holland. (3) The debates that ensued in the several courts are almost without a parallel. The points were argued in the Common Pleas three different times, in three successive terms, by serjeants conspicuous for learning and talent; the Court, in a subsequent term, directed a fourth argument for removing some doubts which had arisen in their own minds; and, after taking two terms more for consideration, Lord Loughborough delivered the unanimous judgment of the Court, which was in favour of the prohibition on the ground stated, and, specifically, because the construction of acts of parliament belongs to the temporal courts. The matter was brought by writ of error to this Court, which gave its judgment (4) immediately, on a single argument, for reversing that of the Common Pleas.

"The leading observation that pervades the judgments delivered by Lord Kenyon and his brother judges is, that the prize courts have jurisdiction over the subject-matter of that suit, and consequently that their decision upon them must be final. Buller, Justice, states this proposition in very general terms, and expressly declines the question whether the decision was right, as one placed beyond the sphere of his own inquiry. The principle, on which the Common Pleas had adopted a different course, underwent very little consideration, either from that able judge, or from the other members of the Court; the assumption of a conclusive right to determine questions brought before the inferior court and within their jurisdiction, being made by them all.

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(1) *Ricketts v. Bodenham*, 4 A. & E. 433.
446.

(2) 1 Hen. Black. 476. 4 T. R. 382.
2 Hen. Black. 533.

(3) *Home v. Camden (Earl)*, 1 Hen.
Black. 476.

(4) *Camden (Lord) v. Home*, 4 T. R. 382.

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“ The judgment of reversal was affirmed in the House of Lords, under the advice of all the judges (1), expressed by Lord Chief Justice Eyre but not sanctioning this doctrine. On the contrary, his lordship studiously avoided laying it down, and went into a lengthened argument on the construction of the prize acts, in order to show that the lords of appeal had taken a right view of them.

“ This case and the entire subject were brought under the revision of this Court in *Gare v. Gapper* (2) and *Gould v. Gapper* (3), where a rule for prohibition, when moved for, was resisted on the ground of conclusiveness in the judgment below; but the plaintiff was directed to declare, on account of the great importance of the subject, and the necessity of having it most maturely considered.

“ After it had been so considered, and again and more fully argued, Lord Ellenborough delivered a long and elaborate judgment of the whole Court, which, in overruling the demurrer to the plaintiff's declaration in prohibition, expressly denied the doctrine; a judgment which bears as high a character of authority as the decision of any single court in Westminster Hall can give.

“ The general law was discussed, when cause was shown against the rule, by barristers filling the first rank in their profession, and enjoying a high reputation for ability and learning. The conduct of the argument on demurrer was confided to two special pleaders of great distinction, afterwards Burrough and Dampier, Justices. The unanimous opinion of the Court was pronounced by Lord Ellenborough, after all the reflection and preparation due to the great judges from whom he dissented. Of those who concurred in it, one (Grose, Justice) had been an assenting member of the Court (4) whose doctrine was impugned: the other two (Lawrence and Le Blanc, Justices) had had their minds familiarised to the subject, by arguing it on opposite sides in the Common Pleas.

“ We are convinced that the case not only rests on authority which we could hardly be warranted in disturbing, but is founded in good reason: indeed, that it flows from the principle of prohibition, which Blackstone (5) states to be the danger of a different decision of the same rights, and even of the same identical interests by different courts; ‘an impropriety,’ he observes, ‘which no wise government can or ought to endure, and which is therefore a ground of prohibition.’

“ There is ambiguity in the expression, that the common law courts have no cognisance of ecclesiastical matters. If it is meant that they have no knowledge of them, the assertion may be fairly questioned. Matters of mere process and practice, which may be in a great measure oral and traditional, are perhaps familiarly known only to the Court to which they belong; but as to the principles of ecclesiastical law, we have in truth the same means of knowledge, access to the same sources of instruction, and the same opportunities, in all respects, of forming a correct opinion. We are acknowledged on all hands to be bound to restrain their proceedings when they transgress their limits: we must then have organs for discerning

(1) *Home v. Camden (Earl)*, 2 Hen. Black. 532.

(2) 3 East, 472.

(3) 5 Ibid. 345.

(4) The Court of K. B.

(5) Vol. 3. pp. 112, 113.

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where the limits are drawn. The same observation proves that, in the other sense of the word cognisance, importing jurisdiction, the temporal courts must possess it; for though prohibition may not lie merely for mistake of fact, nor possibly for every mistake of the law, committed by an inferior court having jurisdiction of the subject-matter, because it may be corrected on appeal, and we shall presume that right will be done, yet is it not, on the other hand, denied that, before sentence, the courts at Westminster have power to interfere for error involving the want of such jurisdiction, though not apparent on the proceedings; and that, if such be apparent, they may, and if they may they must, prohibit, though repeated adjudications to the same effect have been made in the courts below, and even after the solemn sentence of a spiritual court of final appeal. A passage in Fitzherbert's N. B. 43. (A.) proves, in a remarkable manner, how little the proceedings of our courts are considered to be dependent on what may take place by way of appeal in the Spiritual Courts. 'If the king do recover his presentment unto a church, and hath a writ unto the bishop, &c. to remove the other incumbent, for which the incumbent sueth an appeal in the Archbishop's Court, &c., by reason whereof the archbishop sendeth a prohibition, that he do not admit the king's clerk pendent the appeal, &c. then the king shall have a writ directed to the archbishop and his officers to take off his inhibition, and that they do nothing, nor suffer any thing to be done by others, in derogation of the Crown, or of the king's right; and shall have another writ against the incumbent, that he follow not such appeals, provocations, or other process or impediments. And also the king may have an attachment directed unto the sheriff against such incumbent, if he go on then after such prohibition directed unto him.'

"Buller, Justice, truly observes that the cases reported to have occurred in the seventeenth century, under the head of prohibition, are not to be reconciled, nor all supported. He might, perhaps, have added that scarcely one of them can be right, if the doctrine of refusing prohibition, where appeal lies, could prevail. He speaks with satisfaction of the settlement that this law has undergone of late, alluding, however, to no particular case where it was settled. It is singular that, in the work which bears his name, and which, whether his composition or not, has been always regarded as a valuable depository of general principles of law, it is laid down that prohibition is granted 'pro defectu jurisdictionis, pro defectu triationis, or for proceeding as the law of the land does not warrant(1);' the precise ground on which this Court in *Gould v. Gapper* (2) disagreed with the learned judge's sentiments as expressed in *Camden (Lord) v. Home*. (3)

"But his dictum at p. 397. (4), echoed still more strongly by Justice Grose at p. 401. (5), 'I am clearly of opinion, that whether the Court of Appeals were right or wrong in their decree, it is not competent to us to form any opinion upon the subject,' would seem to have been founded on more recent cases. Now those quoted by him certainly fail to make out his proposition (and we are aware of no others). *Pierce v. Hopper* (6), where prohibition was granted without even an attempt to set

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(1) Bull. N. P. 218.

(2) 5 East, 365.

(3) 4 T. R. 397.

(4) Ibid.

(5) Ibid.

(6) 1 Str. 249.

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up his general doctrine; *Howe v. Nappier* (1); with Lord Mansfield's emphatic words, 'Prohibition is ex debito justitiæ, if the Court of Admiralty proceed contrary to act of parliament;' *Full v. Hutchins* (2), was also mentioned by Justice Buller; but it does no more than lay down the rule, as it had been recognised in *Paxton v. Knight* (3), and numerous earlier cases, that after sentence prohibition is not to go for any defect not apparent on the face of the proceedings. Even this rule, however, furnishes an argument against refusing to the subject his right of application to the temporal courts to prohibit the spiritual courts from proceeding. For suppose the party to apply for prohibition for a defect not thus apparent, and to receive for answer 'the defect is undoubted, though not externally visible; but we cannot prohibit because you may appeal, and we have confidence that the Appeal Court will see you redressed.' Perhaps, on hearing the appeal, the superior Spiritual Court may agree with the inferior, on a point of ecclesiastical law; and, if it affirms the sentence in a matter which this court may have pronounced to be beyond their jurisdiction, the power to prohibit is lost, according to *Full v. Hutchins* (4) because final sentence has passed, and there is no defect on the face of the proceedings. And we cannot refrain from observing in this place that, if a prohibition had been moved for in *Gauldern v. Selby* (5), directed to the Consistory Court of Peterborough, and this very question of church rate had been brought before this court, on showing cause, or on demurrer as it is now, we cannot doubt that it must have decided against the validity of the rate, in favour of which no one authority could have been quoted since the only authority which is now pressed upon us is Sir W. Wynne's judgment on the same case brought before him on appeal, instead of being brought here by prohibition.

"The cases in East, then, seem to establish, and consistency of reasoning requires, that the power of prohibition is in no case taken away by the privilege of appeal.

Court of
Queen's Bench
bound to issue
the writ of pro-
hibition, if a
court of inferior
jurisdiction
commit a fault,
although it may
be corrected by
appeal.

"If called upon, we are bound to issue our writ of prohibition, as soon as we are duly informed that any court of inferior jurisdiction has committed such a fault as to found our authority to prohibit, although there may be a possibility of correcting it by appeal. For there is no reason for driving the subject to that expensive process, to abide the chance of repetition of the error, which, if committed, can, at last, be only rectified by prohibition, and may be so committed as to be placed beyond the reach even of that remedy; or, for compelling him to submit even to the dire inconveniences arising from that decision alone, if none lay beyond them.

"The question then remains, what are the defects that authorise us to require us to issue the writ of prohibition? The answer is, that they are in every case of such a nature as to show a want of jurisdiction to decide the case brought before them. (6) In whatever stage that fact is manifest to us, either by the Crown, or by any one of its subjects, we are bound to interpose. The misconstruction of an act is one of these defects; the enforcement of a tax imposed without lawful authority is assuredly

(1) 4 Burr. 1944. 1950. cit. in arg. 4 T. R. 289.

(2) 2 Cowp. 422.

(3) 1 Burr. 314.

(4) 2 Cowp. 422.

(5) 1 Curt. 394.

(6) *Gardner v. Booth*, 2 Salk. 549.

another; and such a tax we deem a church rate to be, which is laid by parish officers, not only without the concurrence of the parish, but in defiance of their declared refusal to declare. This is no irregularity which may be waived or cured, leaving the principal matter substantially complete, though attended with unusual and informal circumstances; but it is a proceeding altogether invalid, and a church rate in nothing but the name.

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“Our judgment must, therefore, be given in favour of the plaintiff.”

The important question, whether the minority of a vestry can make a valid rate after the majority have refused, when the Ecclesiastical Court has ordered a rate to be made, was discussed in *Veley v. Gosling* (1), and *Gosling v. Veley* (2), when Sir Herbert Jenner Fust and Lord Denman gave the following judgments, and in which the facts of the case have been fully incorporated.

Whether the minority of a vestry can make a valid rate after the majority have refused, where the Ecclesiastical Court has ordered a rate to be made, discussed in *Veley v. Gosling* and *Gosling v. Veley*.

In *Veley v. Gosling* (3) it appeared that the parish church of Brain-tree being very much out of repair, a monition issued from the Consistory Court of London, commanding the churchwardens to summon a vestry for a specified day and hour, and ordering the parishioners then to attend and make a church rate. A vestry having been convened, a survey and estimate of the repairs and the expenses was produced, and no objection made to either. A rate having been proposed and seconded, an amendment (in effect) “that no rate be granted,” was moved and seconded, and on a show of hands, was carried. The majority of the parishioners who had negatived the granting a rate having quitted the vestry, the churchwardens and the minority continued to remain in vestry, and re-proposed and carried the necessary rate. It was held, by Sir Herbert Jenner Fust, reversing the decision of the Chancellor of London, that such rate was a legal and valid church rate, and who assigned, among other reasons for such judgment, the following:—

“The case of *Gaudern v. Selby* (4) has been much dwelt on. I think this case did not meet with the attention in the Court of Queen’s Bench, which is due to it; I think, to a certain extent, it has been calumniated. The Court of Queen’s Bench repudiated it as an authority, but I think the case was not properly presented to that Court, so as to enable it to form a correct opinion on the case; it went to that Court with many seeming anomalies and irregularities, pointed out by the judge of the Consistory Court, and with the knowledge that he had expressly stated his dissent from it. Most certainly, in that case, there were irregularities in the proceedings in the inferior court, but they were not treated of in the Arches Court. The case came to the Arches Court on the merits, on the question whether the rate was a valid rate; there was no appeal in any of the intermediate stages. [The Court stated the nature of the case, and the technical proceedings; observing, that they were fully stated in the judgment of the court below.] I cannot say the proceedings were very regular, but no objection on that head was taken, when the cause came up by appeal; there was no motion on the subject; no application to suspend the hearing, until the irregularities had been cured; the proceedings were in the usual form of an appeal, with one important exception,—that in this Court a new

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(1) 3 Curt. 253.
(2) 7 Q. B. 405.

(3) 3 Curt. 253.
(4) 1 Ibid. 394.

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plea was given in, stating expressly this fact,—‘that the rate had not been allowed by the major part of the parishioners; who, on the contrary, had disapproved of and disallowed it;’ bringing the main question directly to the notice of the Court; Sir W. Scott was the counsel who signed this plea; the point was argued, and, true it is, no authorities were cited, either in the argument or in the judgment, but it cannot be said that Sir W. Wynne, in the year 1799, was ignorant of the law of church rates: he would not be unprepared to give a decision on the point. It has been surmised, that Sir W. Wynne did not intend to decide this point; that, in point of fact, he thought he was deciding on the question, whether in any event, churchwardens could make a rate of themselves? whether after a vestry had been duly summoned, and the parishioners did not attend, a rate could be made by the churchwardens, without a majority of the parishioners? but this is mere conjecture; the true distinction between the two cases, as it appears to me, has never been understood. But am I to assume that all the circumstances of the case were laid out of Sir W. Wynne’s consideration? that they had no weight in his decision, when they were so pointedly called to his attention; namely, that this was a rate made by the churchwardens, without a majority? In deciding that case, Sir W. Wynne decided on all the circumstances of it, and on the consideration due to them. I have been told, — what is perfectly true as a general observation, — that judgments are to be confined to the cases immediately before the courts in which they are given: is this case an exception? Why, suppose Sir W. Wynne decided this case, when all these circumstances were not present to his mind. I am not at liberty to assume any such thing; and, as this case may be of some importance, I have no hesitation in saying, that it is not liable to be impeached, on the ground of being an anomalous case, and not worthy of notice. Grant that there were irregularities,—they were committed in the court below; no objection was taken on that ground in the Court of Arches; Sir W. Wynne, sitting as the judge of that court, could not dismiss the appeal on account of irregularities in the court below; in the furtherance of justice, he was bound to hear the case on the merits. But, in point of fact, were the irregularities in *Gaudern v. Selby* (1) such as the party appellant could take notice of? I very much doubt if there were such irregularities; I have found a case in which it was held that irregularities of such a nature were not sufficient to vitiate proceedings in an appellate court; it is a case in 1713. (2) A citation issued in the name of John Rogers, as the commissary of the Archdeacon of Leicester; and also in the name of George Newell, official to the archdeacon; it called on Mary Townshend to answer to Lewitt and Page, the churchwardens of All Saints’, Leicester, in a cause of subtraction of church rate. Articles were exhibited against her in the name of the commissary and official. Some of the acts were sped before the commissary only; in others, he had acted for Newell as official. Sentence was given by Newell, the official; he signed the sentence as surrogate to the commissary; the party cited was condemned in the rate and expenses; the cause was brought to the Arches by appeal; it was objected that the proceedings were a nullity; in other

(1) 1 Curt. 394.

(2) *Townsend v. Lewitt & Page*, Arches,

4th session, Hil. term, note of Dr. A. drew.

words, the manner in which the cause had been conducted in the court below was so irregular, that the party ought to be dismissed, without the Court proceeding into the merits of the case; the arguments were of considerable length, and it was insisted, that the same person could not sit as judge in two distinct capacities. Cases were cited on each side, one, *Drakins v. Newell*, from the same judges, which it was said was dismissed on the same account; on the other side, *Biddle v. Parsons*, determined in the Arches, on appeal from the same judges, and no objection made to their acting jointly. Reference was made to an award of the Bishop of Lincoln, between the official and commissary,—and this shows how impossible it is for this Court to decide on such cases without knowing all the circumstances of them,—it turned out that there was an arrangement, that these two persons should sit simul et conjunctim. An award of the same nature was made by Archbishop Whitgift. The answer to the objection was, that it should have been made before issue joined, ‘exceptio fori declinatoria est, et ante litem contestatam opponi debet (Parnormitan);’ the result of the proceedings was this, that the objection not being taken when it ought to have been, the judge decided, that he must proceed to hear the case on the merits, and the result was, the party was dismissed with his costs. In *Gaudern v. Selby*, there are a variety of seeming irregularities, but if an opportunity had been given for explanation, they might have been explained; at all events they ought to have been objected to before issue was joined on the appeal, but no objection was taken by counsel on behalf of the appellant. It has been attempted to explain this, by saying, that owing to the press of business in the Admiralty Court, in 1798, Lord Stowell had just become the judge of the Admiralty, and that he had signed the appellant’s case. But who were the counsel for the appellant? Dr. Arnold and Dr. Sewell; neither of these persons were likely to neglect the interests of their client, they would have seen any objection of the kind, and would have advised their client accordingly; no objection was taken to the proceedings, and the cause proceeded to a hearing. If this judgment of Sir W. Wynne had not met with the approbation of a large majority of the profession; if it had been thought that the case was not rightly decided, and that the rate was invalid, would not the party have been advised to appeal? Under these circumstances, surely Sir W. Wynne must have decided the case on the merits. Be the irregularities what they may, they do not detract one iota from the judgment; Sir W. Wynne must be taken to have decided, that the rate was a good, valid, and legal rate, capable of being enforced in the Ecclesiastical Court. Sir W. Wynne was the last judge who would have made a law; he invariably took the greatest care to satisfy himself as to what the law was, but when he had once done so, he never hesitated to pronounce what the law was. I look upon his decision as a direct, positive, and absolute decision on the present point, as a precedent binding on this Court, and which neither I, nor any judge of this Court, am at liberty to depart from. Whether the judgment in the Courts of Queen’s Bench has shaken the authority of the case, is a question I am not at liberty to enter into; if I was satisfied that the judgment was not founded on authority, and a just apprehension of the law, I might then refuse to be bound by it; but not thinking so, I have no objection to shelter myself under the authority of Sir W. Wynne, and to express my opinion

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that, what he has pronounced to be law, is law. That judgment in no way militates against the decision of the Queen's Bench, the point before that court was not the point decided in *Gaudern v. Selby*. Did the Court of Exchequer Chamber repudiate this case as an authority? Undoubtedly they have not so expressed themselves; it was no precedent for the case before that court. Have not the judges of the Court of Error said, that 'there is a wide and substantial difference between the cases,—between the case then before them, and a case which might possibly occur,—in fact, this very case. What is the meaning of the term, 'wide and substantial difference?' Must it not mean such a difference as will tend to a different result in the decision of the two cases? So far then from repudiating that case, if compelled to do so, I should rather say they adopted it; otherwise, I think they would not have thrown out the observation, that it was a point deserving of great consideration, on which they reserved to themselves the power of forming an opinion whenever it should occur. Can I suppose those judges would have gone out of their way to make use of such marked expressions, unless they really attached some importance to the distinction between the cases? On the contrary, I think the supposition is rather in the alternative, that they would have guarded themselves from the possibility of being supposed to have entertained even a notion of the existence of any such distinction. I therefore consider the case of *Gaudern v. Selby* as a direct authority for this rate; the learned judge of the Consistory Court has said, that it is neither a precedent, nor an authority; I am of a different opinion, I think it a very considerable authority. It has been said, that the decision in that case came by surprise on the profession: that the Ecclesiastical Commissioners, in their investigation of the law, were not aware of such a case. As a member of that commission, I do not know that I ever heard of the case by its real title, but, at a very early period of my entering this profession, I was always led to think that the law was such, and had been so laid down; nothing can be more clearly shown by the Report of the Ecclesiastical Commissioners than this, that in their opinion such a case might arise. If my recollection serves me, I always understood, that, although the point was doubted, the better opinion was, that such a rate was a good and valid rate; but I well remember, that at an early period of my communication on the subject with the learned judge of the Consistory Court, he entertained a different view of the law."

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Lord Denman, in delivering the judgment of the Court, in *Gosling v. Veley* (1), said, "We are now to give our judgment in this case, which, from its importance and difficulty, and from other circumstances, has been delayed longer than we could have wished. In so doing, it will be unnecessary to go into the history of the transactions which have given existence to the cause; and the rather as, in the course of our observations, we shall think it right to examine minutely the allegations on the record, on which alone our decision must turn.

"The question in the cause is, whether the rate mentioned in the declaration has been well made. And, before we enter into the examination of particulars, it may be as well to state, that we conceive it to be now clearly settled that a church rate can only be made by the churchwardens and

parishioners in vestry assembled, understanding the former term to include the latter also, if no other parishioners, after due notice, attend, and understanding the latter term to include occupiers, although not personally resident in the parish. When so assembled, the major part will bind the minority and the whole parish, for the purpose of making the rate, and in every legal incident thereto. Unless, therefore, the present rate can be shown to have been, in a legal sense, made by the majority of those assembled in vestry on the occasion mentioned in the declaration, and taking part in the proceedings for which they were then assembled, it is not a valid rate; and the burthen of proof is certainly cast on those who affirm its validity.

Upon the argument of this case, the counsel for the defendants did not shrink from meeting his opponent on this principle. Majority he truly asserted to mean legal majority; and he contended that, although there might be numerically more vestrymen present, who were in intention adverse to the rate than those who voted for it, yet the majority of votes legally expressed was in its favour. This position he sought to establish by showing that the vestrymen who were so adverse had thrown away their votes: and he likened this case to those which have been decided in regard to corporate assemblies for corporate elections, or the meetings of freeholders or burgesses in elections to the House of Commons. It may be convenient, therefore, in the first place, to examine into the principle on which this rule as to corporate and other elections appears to have been established, and then, after stating the facts which these pleadings disclose with regard to the proceedings now in question, to see whether it is properly applicable to those facts, so as to be the groundwork of our decision.

First, the cases in which the rule has been either stated or applied in regard to corporate elections are very numerous. It may be sufficient to refer to four of the most important, either for the arguments or the judgment,—*Oldknow v. Wainwright* (1), *Rex v. Monday* (2), *Rex v. Hawkins* (3), and *Rex v. Parry*. (4) The result of the decisions appears to be this. Where the majority of electors vote for a disqualified person in ignorance of the fact of disqualification, the election may be void or voidable, or, in the latter case, may be capable of being made good, according to the nature of the disqualification: the objection may require ulterior proceedings to be taken before some competent tribunal, in order to be made available; or it may be such as to place the elected candidate on the same footing as if he never had existed and the votes for him were a nullity. But in no such case are the electors who vote for him deprived of their votes if the fact becomes known and is declared while the election is still incomplete; they may instantly proceed to another nomination, and vote for another candidate. If it be disclosed afterwards, the party elected may be ousted and the election declared void; but the candidate in the minority will not be deemed *ipso facto* elected. But, where an elector before voting receives due notice that a particular candidate is disqualified, and yet will do nothing but tender his vote for him, he must be taken voluntarily to abstain from exercising

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Where the majority of electors vote for a disqualified person in ignorance of the fact of disqualification, the election may be void or voidable.

(1) Or *Rex v. Forecroft*, 2 Burr. 1017.

(2) 1 Black. (Ser W.), 229.

(3) 2 Cowp. 533.

(4) 10 East, 211.

(5) 14 Ibid. 549.

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his franchise ; and therefore, however strongly he may in fact dissent, and in however strong terms he may disclose his dissent, he must be taken law to assent to the election of the opposing and qualified candidate ; he will not take the only course by which it can be resisted, that is, helping to the election of some other person. He is present as an elector, his presence counts as such to make up the requisite number of electors where a certain number is necessary ; but he attends only as an elector to perform the duty which is cast on him by the franchise he enjoys as elector : he can speak only in a particular language ; he can do only certain acts : any other language means nothing ; any other act is merely null : his duty is to assist in making an election. If he dissents from the choice of A., who is qualified, he must say so by voting for some other also qualified ; he has no right to employ his franchise merely in preventing an election, and so defeating the object for which he is empowered and bound to attend. And this is a wise and just rule in the law. It is necessary that an election should be duly made, and at the lawful time ; the election meeting is held for that purpose only : and, but for this rule, the interests of the public and the purpose of the meeting might both be defeated by perverseness or the corruption of electors who may seek some undue advantage by postponement. If, then, the elector will not oppose the election of A. in the only legal way, he throws away his vote by directing it where it has no legal force ; and, in so doing, he voluntarily leaves unopposed, *i. e.* assents to, the voices of the other electors.

Where the
disqualification
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entitled to
notice.

“ Where the disqualification depends upon a fact which may be unknown to the elector, he is entitled to notice ; for, without that, the inference of assent could not be fairly drawn, nor would the consequence as to the election be just. But, if the disqualification be of a sort whereof notice is to be presumed, none need expressly be given ; no one can doubt that if an elector would nominate and vote only for a woman to fill the office of mayor or burgess in parliament, his vote would be thrown away : there the result would be notorious ; and every man would be presumed to know the law upon that fact.

Whenever
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election made
by those who
do.

“ It follows from these observations that the true ground of the decision is that stated by Lord Mansfield in the case first cited. (1) ‘ When electors are present, and do not vote at all, they virtually acquiesce in the election made by those who do.’ In that case the numerical majority contented themselves with protesting against the election of him for whom the minority voted. In the case of *Taylor v. Bath (Mayor of)* (2), the counsel in argument took the distinction between not voting at all and voting for the disqualified candidate ; they admitted that silence might well be held to give consent, but that voting for the other candidate was an express negative : it was the only way, they said, of voting against one person and voting for the other. But the Court overruled the distinction ; to vote for a person not qualified, they said, was the same thing as not to vote at all, which it was admitted would have been a constructive assent.

“ It will not escape observation, that in all these cases the law requires the concurrence of a majority of the electors present to make the elec-

(1) *Rex v. Foxcroft*, 2 Burr. 1021.

(2) 3 Larkr., 321. Note (II) to the

case of the *District of Boroughs of*
W. P., &c.

good. In none of them could it be stated as a tenable proposition that the minority could 'bind' the majority, or make a good election against their votes. In all of them, too, the numerical majority were *de facto* opposed to the election made. Yet this fact was never considered as rendering the election in law other than by an actual majority.

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"Whether the rule we have now been examining would apply to the proceedings of a vestry assembled to make a church rate, was a question first suggested by the Court of Error in the case of *Veley v. Burder* (1), and originating with the court. In point of authority, it can be put no higher than as a suggestion, a point stated as fit for inquiry. At the same time, some weight must be necessarily attached, we think, even to such a suggestion of so high a court, made in so elaborate a judgment on a matter so important, especially as it was obvious that the suggestion must lead to a very expensive experiment, as it has done in the present case. Thus far important, and no farther, do we consider the passage alluded to in the judgment to have been.

"Undoubtedly some weight must be allowed to the observation that, although there have been periods where a great difficulty existed in procuring the making of church rates, this principle, though easy of application, never appears to have been resorted to or thought of. But, in the first place, the rule itself, as applicable to electors of any kind, does not appear to have received any judicial sanction till long after the temporary difficulty as to church rates had died away. And, secondly, the peculiar mode of proceeding, which may be considered as equivalent to the throwing away of votes, does not appear to have been ever adopted before the present occasion. And, besides, those who are familiar with the manner in which our common law has been built up and declared by judicial resolutions will be aware that the mere lateness of time at which a principle has become established is not a strong argument against its soundness, if nothing has been previously decided inconsistent with it, and it be in itself consistent with legal analogies.

"These, however, are on both sides but in the nature of make-weights, which will not in themselves dispose of the question; the cardinal point of which appears to us to be this: whether, under the circumstances stated in the declaration, it was conclusively the duty of the parishioners assembled on that occasion in vestry to make the rate proposed to them. It is necessary, therefore, before we proceed in the inquiry, to see exactly what are the facts alleged.

"The declaration, which is demurred to generally, sets out the libel; and, as the question is, whether it was proper to admit that to proof, the allegations in it must for the present purpose be argued upon as true. It commences with stating the want of repair, continued and increasing from 1834; the holding of vestries, and the refusal of any rate for the repair, or for providing necessaries for the decent celebration of divine service; the making a rate by the churchwardens alone in June, 1837, out of vestry, and after a refusal by the parishioners in vestry; proceedings to enforce the payment of this rate, and the prohibition issued from this court. A subsequent vestry and refusal in 1841,—although a continuing want of repair

(1) 12 A. & E. 308. *ante*.

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and of funds in the hands of the churchwardens, — the making of a survey and estimate, with the due exhibition of it to the parishioners, are averred. It then alleges that the same wants continuing, were set out in an affidavit brought into the Consistorial Court; and that thereon a decree issued, requiring the churchwardens and parishioners to show cause why a monition should not issue against the churchwardens to take the necessary steps to put the church in repair, and for providing necessaries for the decent celebration of divine service therein, and, amongst other things, to call a vestry for a certain day, place and hour, for the purpose of making a rate; and against the parishioners, to meet in such vestry, and then and there to make a rate for and towards the purposes aforesaid. The decree then warned them that, unless they appeared and showed good cause to the contrary, the monition would be decreed accordingly. It further states the due service of the decree, that no cause was shown, the appearance and submission of the churchwardens, the non-appearance of the parishioners, and the issuing of the monition, its service and return. It goes on to state the continuance of those circumstances which made a rate necessary, and the meeting of the vestry in July, 1841, in obedience to the monition. And this brings us to the proceedings on which this case arises. The monition and notice of vestry were read; the churchwardens produced and exhibited a survey and estimate; the necessity for the repairs was not disputed or denied; nor was any objection made to the amount of the estimate. A rate of 2s. in the pound was then proposed and seconded, for the necessary repairs of the church, and for providing necessaries for the decent celebration of divine service and offices therein. And thereupon it is alleged that an amendment was moved and seconded, which, although somewhat long, it may be right to give in its terms. ‘That all compulsory payments for the support of religious services of any sect or people appear to the majority of this vestry to be unsanctioned by any portion of the New Testament Scriptures, and altogether opposed to and subversive of the pure and spiritual character of the religion of Christ; but that for any one religious sect to compel others which disapprove their forms of worship or system of church government, or which dissent from their religious principles and creeds, to nevertheless submit to support and extend them, appears to this vestry to be a yet more obvious invasion of religious freedom and violation of the rights of conscience; while also it appears to be a gross injustice to dissenters, as citizens, to compel them to pay for the religious services of others in which they have no part, while they build their own chapels, support their own ministers, and defray the expenses of their own worship. That compulsory church rates, and more especially such rates upon dissenters, thus appearing to be as a tax unjust, and as an ecclesiastical imposition adverse to religious liberty and contrary to the spirit of Christianity, this vestry feels bound by the highest obligations of social justice and of religious principle to refuse to make a rate, and does refuse accordingly.’ This amendment, on the show of hands, was declared to be carried; and no poll was demanded. The libel proceeds to state that, immediately after, and while the parishioners continued in vestry assembled, the question was put whether any other amendment was proposed, or any other proposition as to the amount of rate was made; no affirmative answer was returned; nor was any other motion or proposition made towards discharging the

obligation of repairing the parish church. That thereupon the churchwardens and others of the parishioners, then and there present in the vestry, did, in obedience to the monition and in discharge of that obligation, at the said meeting, and while the parishioners continued so assembled in vestry, rate and tax the parishioners, for the necessary repair of the church, and for providing necessaries for the decent celebration of divine service and offices therein, the several sums of money mentioned in the said rate, being a rate of 2s. in the pound, and that, accordingly, a rate of 2s. in the pound was then and there produced, made and signed by the vicar, churchwardens, and others of the parishioners, then and there present; one of the opponents, on behalf of himself and others, protesting against this proceeding. This closes the statement of the libel, as to the circumstances under which and the manner in which the rate in question was made, and is all that is material to the question now before us.

"We are now to determine how far the principle deduced from the cases examined in the former part of our judgment is properly applicable to the facts contained in this statement.

"And, first, it is essential to determine what is their substance and real import. On this, two general remarks at once occur. The first, that this was not a vestry called in the ordinary way, on the mere motion of the parishioners, or any part of them, or of the churchwardens, but in obedience to a monition from the court of competent jurisdiction in such matters, the monition specifying the time, place, and purpose of the meeting. We should have been glad if the judgments in the Ecclesiastical Courts had thrown any light on the importance of this circumstance; but they do not. The learned judge of the Consistory Court, who held the rate illegal, according to Mr. Johnson's Report, pages 51, 52. (1), notices it shortly in his most able judgment, expressing a doubt whether it was regular to fix the day and hour for holding the vestry in the monition, treats the monition as if it were only to call a vestry for the purpose of making a rate; whereas it goes farther, and directs the parishioners not merely to consider whether a rate shall be made, but 'then and there to make a rate for and towards the purpose aforesaid;' and sums up by saying, 'the rate was made in pursuance of the direction of this court, and till the contrary shall be decided, I must consider that direction as legal, and made on competent authority.' If the direction were legal, and made on competent authority, and the rate was made in pursuance of that direction, it would seem difficult to deny its validity. And in this there would be much reason, and no injustice, there can be no doubt that the Ecclesiastical Court has a general jurisdiction in the subject-matter; the regularity of the decree and the monition have not been questioned; and the latter issues against parties making default. It is clear, however, that the learned judge did not intend to be understood as his words, if correctly reported, might seem to import: nor do we mean to rely on this fact as establishing the legality of the rate, for this obvious reason, among others, that, unless the rate can be truly said to have been made by the vestry, i.e. the legal majority of votes, it was not made according to the directions of the monition: and so this point will resolve itself into the more general one.

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(1) Judgments in the *Braintree Church-rate case*, by Cuthbert W. Johnson, 1843; et vide *Feley v. Gosling*, 3 Curt. 284, 285.

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" But, although the fact does not in itself establish the validity of the rate, it is not without its importance as a circumstance to determine the character of the conduct pursued by the majority, and the true import of the amendment which they carried upon the motion for imposing the rate.

" We pass to the second and more general point, the character of the proceedings at the vestry. It appears, then, that that meeting being duly constituted, no one disputed the necessity for repairs; no one objected to the amount of the estimate; and, when a rate of 2s. in the pound was proposed, no one questioned the propriety of that as to the amount; further, no one proposed that the parishioners should in any other mode, as by labour or contribution of materials, if such a mode could have been adopted, put the church in repair. The only objection was to the law which cast on them the burden of the repair; and this ended in a protest against all compulsory church rates, and a refusal to make any rate. This objection, improperly called an amendment on the first proposition, the chairman, perhaps unwisely, took the sense of the meeting on; and it prevailed, upon the show of hands; no poll was demanded; but the chairman gave full opportunity for the proposal of any other and more legal amendment: and, none being proposed, the party in favour of the original proposition reverted to it, and made and signed the rate of 2s. accordingly, the majority offering no further opposition; for the protest cannot properly be so called, being unaccompanied with any proposal, and nothing more than a perseverance in abstaining from all share in the business of the day.

" Now it is perfectly clear that the course pursued by the majority was one contrary to the law, and beyond the only purposes for which they were assembled, contrary to their duty, and beyond their competency as vestrymen; a course perfectly irrelevant to the proposition submitted to them, as much as if they had protested against the existence of an Ecclesiastical Court, or government by Queen, Lords, and Commons, or had voted the Established Church to be a nuisance.

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ing the church,
and on this
point it leaves
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" The law has cast on the parishioners the duty of repairing the church; on this point it leaves them no option: on the parishioners, in vestry assembled, it casts the duty and confers the privilege of determining whether any and what repairs are needed, whether the estimates be proper, what amount will be necessary, and what will be the just proportions in which the common burden shall be borne by the individuals. These, and these only, were the purposes for which they were assembled; and, in this assembly, they were not acting merely as individuals, but represented the whole parish, and were capable of binding the whole parish in all that regarded the lawful purposes of the meeting. Accordingly, they agree that the repairs are needed, the estimates correct, the proposed rate reasonable in amount; but the majority stop there; they will neither vote that rate, nor any other; they will only protest against compulsory church rates, and refuse to agree in making any rate, including therein, necessarily, that which had been proposed. The original motion then remained without any amendment to displace it. Full opportunity was given to move any other consistent with the purpose of the meeting; and, none being moved, it was clearly unnecessary again to propose the original motion: but they who were willing to perform the duty for which they were assembled vote upon

it, and, in pursuance of their vote, claim to have made the rate which is now in question.

"Before we proceed to examine the legal effect of this, it may be well to observe, although it would hardly escape notice, that this examination steers quite clear of the question which has been so much discussed on former occasions; the mode, namely, of compelling a vestry to make a rate, or of punishing parishioners who refuse to make one when necessary: for it is contended that the vestry has made a good rate; that the parishioners have, in this respect, done their duty. The plaintiff denies this. The decision will not be directly affected by the previous judgment of this Court or the Court of Exchequer Chamber.

"Let us now examine whether the position of the defendants can be maintained, that a good rate has been made; in other words, whether they are right in supposing that the same rule may be applied to the proceedings of a vestry, assembled for the purpose for which this was assembled, which has been established in the cases above referred to. This will depend on whether, under the circumstances, it was conclusively the single duty of the vestry to make the rate proposed. If it were, it will not be difficult to arrive at the conclusion that any number of those who were present and unwilling to perform it cannot prevent the others who were willing, by saying or doing any thing which was merely beside the purpose of the meeting.

"It is alleged by the plaintiff that, in the corporation cases relied on, the corporators assembled were bound to make an election; that was the purpose of the meeting, the duty of those assembled; they had no right to consider whether an election should be made; they could only decide between eligible candidates; but that the vestry had a right, and a duty was cast on them, to deliberate, first, whether repairs were necessary and to what extent; secondly, assuming a necessity, and an agreement as to extent, whether they would do them at all, and, if at all, whether they would do them by imposing a money rate, or in any other way. Upon the first point both parties are agreed; and, in fact, the vestry have deliberated, and unanimously agreed, both that repairs were necessary, and to the extent alleged by the churchwardens. To the second, the defendants answer that the vestry had no power to refuse the doing the repairs; and, to the last, that, even if any other mode of repairing might have been adopted so as to be compulsory on the parish, yet, as none other was proposed, and the rate which had been proposed was at least a lawful mode, in this state of things it became at all events the duty of the vestrymen to make that rate. Conceding, say they, that by law another kind of rate might have been proposed and carried; yet, as this was not done, and the repairs cannot be left undone, you were bound to do them in the mode proposed, which was in itself legal.

"If, indeed, the vestry, under the circumstances (and it can scarcely be too often repeated that we are reasoning only on the circumstances appearing on this record), were at liberty to discuss, not only whether they would or would not make the rate proposed, but whether they would do the repairs at all, or, if they agreed to do them, whether they would do them in any other way, it must be conceded that the analogy fails between this case and the cases above mentioned, and that there is nothing in the conduct of the

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majority from which their acquiescence in the acts of the minority can be inferred.

“The first of these points, however, cannot in this court be considered an arguable question. We have expressed our deliberate opinion upon it and the language of the Court of Exchequer Chamber in *Veley v. Burder* (1) is decisive: ‘that the repair of the fabric of the church is a duty which the parishioners are compellable to perform; not a mere voluntary act, which they may perform, or decline, at their own discretion: that the law is imperative upon them absolutely, that they do repair the church; not binding on them in a qualified limited manner only, that they may repair or not as they think fit: and that, where it so happens that the fabric of the church stands in need of repair, the only question upon which the parishioners, when convened together to make a rate, can by law deliberate and determine is, not whether they will repair the church or not (for on that point they are concluded by the law), but how, and in what manner the common law obligation, so binding them, may be best and most effectually, and at the same time most conveniently and fairly between themselves, performed and carried into effect.’

“This, therefore, brings us to the second point for which the defendants contend, and which, it will be observed, is left undecided in the passage we have just quoted. That the mode of providing for the repairs by a rate is very ancient, and in itself just and reasonable, and perfectly valid in law, is shown in the same judgment. It was unnecessary to say more. Neither in the present case is it necessary to decide that, under all circumstances, for the accomplishing every object for which a church rate is commonly made the parishioners are bound to have recourse to that mode, and that alone. The legal condition of the vestry in this respect is said to be that of a body competent to make a bye law, a deliberate body for that purpose; the burden of repair and of providing all things necessary for the decent celebration of divine service being cast on the parishioners, the vestry are at least bound to set in order and provide some means by which these ends may be accomplished. Every church rate, it has been said, is made in exercise of the power conferred on the vestry, is in fact a bye law made for the occasion; and it may be conceded, without prejudice to the defendants, that there may be cases supposed, very rare perhaps, in which the bye law might be made in some other way than in the imposition of a church rate.

“It is, indeed, at first sight, somewhat difficult to understand the theory of a bye law as applicable to the decision of a vestry upon the mode of repairing the parish church in each individual instance of repair needed. A bye law, though made by, and applicable to, a particular body, is still a law and differs in its nature from a provision made on, or limited to, particular occasions; it is a rule made prospectively, and to be applied whenever the circumstances arise for which it is intended to provide. In this sense it is certainly inapplicable to the resolution of a vestry in any particular instance making a church rate, or ordering any other mode of meeting a particular demand in respect of the church or the services therein. In several books, however, the term ‘bye law or ordinance’ will be found used in a more general way with reference to church rates; and it was adopted in

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the judgment pronounced in the Exchequer Chamber in *Veley v. Burder*. (1) Thus Lord Coke, commenting on Litt. s. 165. (2), says, 'An upland town' (i. e. one neither city nor borough) 'may allege a custom to have a way to their church, or to make bye laws for the reparations of the church, the well ordering of the commons, and such like things.' The marginal references are to the Year Books. But the often cited case in Tr. 44 E. 3. fol. 18 B. pl. 13., is the only one which we have been able to find bearing on the point: and in that the custom in question, or the bye law, was not for the making a rate, but for the appointment of collectors, and distraining the goods of those who, after a rate made at any time, should not pay the sum assessed: and upon the validity of such a custom or bye law no decision was come to. So in the *Chamberlain of London's case* (3) it is said, that 'inhabitants of a town without any custom may make ordinances or bye laws for the reparation of the church, or a highway, or of any such thing which is for the general good of the public; and in such case the greater part shall bind the whole without any custom.' This is only in the argument of counsel; and for it the Year Book, Tr. 44 E. 3. fol. 18 B. pl. 13., is cited. In the margin, *Jeffrey's case* (4) is referred to, which only determined that the occupier of land, although not resident within the parish, was rateable to the repairs of the church. In *Norris v. Staps* (5), and *Rogers v. Davenant* (6), the same expressions are used. But in all these places it will be seen that the matter under consideration, or for which the case of parishioners and church repairs was referred to by way of analogy, was the power of the vestry, by its resolution for the making a rate for repairs, to bind the parish, the parishioners being for this purpose 'as it were' (to use Lord Hobart's expression) 'incorporate: ' it does not appear that any such deliberate discretion as to the mode of repairing as that now insisted on, was at all present to the mind of the judges or counsel who used the expression. It is evident, on the contrary, that the mode of repairing present to their minds was always that by money rate, and that, when they speak of custom, bye law, or ordinance, they are either speaking somewhat inaccurately of the authority by which it is imposed, or some special circumstance as to the manner of collecting or enforcing the payment.

"These observations might lead to an inquiry of some length and interest, in which distinctions might be found to arise upon the several objects for which church rates are required, and the several foundations of common, statute, or ecclesiastical law, on which the liability of the parishioners rests. But we purposely abstain from entering upon it, because we agree with the defendants in the answer which they give, founded on the special proceedings at this vestry. This was a case in which the parishioners were required to provide a fund both for repairs and the decent celebration of divine service in the church; a money rate was the only mode of providing for the latter; it was a lawful and reasonable mode of providing for the former; it was proposed, and its amount unquestioned. If, then, any other mode could have been suggested, it lay upon those to propose it who objected to that which was in due form proposed; that

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(1) 12 A. & E. 304.

(2) 1 Inst. 110. (b).

(3) 5 Co. 62. (b).

(4) Ibid. 66. (b).

(5) Hob. 210. 212. 5th ed.

(6) 1 Mod. 194.

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Lord Denman
in *Goaling v.*
Veley.

If parishioners
assemble,
clothed with a
limited charac-
ter, or charged
by the law with
a certain duty,
and do any act
beyond their
character, or in
contravention
of their duty, it
reckons for
nothing.

which was at least reasonable and lawful in itself, which was at least one way in which the duty of the vestry might be performed, could be displaced, not merely by protesting against it, but only by the substitution of some other, equally legal and effectual. But this was not attempted.

“ The result of the whole is this : the vestry was lawfully assembled to consider of the repairs of the church, and the providing things necessary for the due and decent celebration of divine service therein ; the members present agreed that repairs were required, and that there was a want of such necessities ; they agreed that the estimates submitted by the churchwardens were reasonable, the amount proposed proper ; whereupon it became the duty of the vestry to make provision of some sort ; a rate was duly proposed ; no amendment was moved, no modification suggested, no other rate put forward ; but the majority, in the strongest terms, protested against it and against all compulsory rates. The minority disregarded this protest, and made the rate first proposed. This seems to us a case in which the rule as to corporate and other elections is properly applicable ; the principle on which it is founded directly governs it. Under the circumstances, there remained only a certain thing to be done by the meeting ; the parishioners were assembled under competent authority for the doing of it ; they came clothed with a limited character, charged by the law with a certain duty ; whatever any of them, however numerous in proportion to the remainder, said or did foreign from the purpose, or going beyond the character, or in contravention of the duty, reckons for nothing ; it is not to be counted against the acts of those who seek to discharge their duty ; it is the speech or act of the individuals, not of the vestrymen.

“ As it is said in one of the cases, it is the same as if they had been silent, and, being present but silent, exactly as if they had been absent. They must be taken to assent to what the other vestrymen agree to, and such, in the carrying out of the purpose of the meeting.

“ Nor needed there any notice to be given which was not given. No fact was unknown to the majority, the knowledge of which might have altered their votes. The law, under which they were assembled, which determined their duty and the purpose of their meeting, they must be presumed to have known ; and it is satisfactory to feel sure that they did know it. The recency and the great notoriety of the judgment in *Veley v. Burder* (1), and the very language of their protest, put this beyond doubt.

“ Neither can it be said that this is to apply a rule of law, limited to one subject-matter, to another and distinct class of cases. For it is not properly to be considered as a rule of corporation as it is one for the ordering of all meetings assembled to deliberate and vote on the performance of a definite duty. Wherever the proceedings at such meetings have come in question before the courts of common law (and there have been many such vestry meetings, meetings of turnpike trustees, parish meetings for the election of parochial officers), the same general rules have been applied as grounds for deciding on their validity. The chairman or president has always been considered as charged to exclude irrelevant motions.

(1) 12 A. & E. 265.

and to admit voting only upon such as are within the purpose and competency of the meeting.

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"The principle, indeed, may be best illustrated by the analogy drawn from electoral meetings; but it is, in truth, of a very general nature, and inseparable from the proceedings of any assembly convened for doing some act necessary to be done at that meeting. The majority must do it; otherwise, however necessary, it will be left undone. But what majority? The majority of those who choose to take a part in the proceedings of the assembly. At almost every meeting of commissioners for executing public works and imposing rates for the purpose, it is probable that the resolution is formed by a small number of those who attend, on whom the larger number are content to rely. If it were found as a fact that five had passed the resolution in a room containing twenty, of whose proceedings the other fifteen were ignorant, this would be the undoubted act of the whole meeting, if the proceedings had been conducted regularly, and no fraud were practised to occasion the ignorance of the fifteen. But suppose the twenty were convened to do an act which the law required them to do at that time, and the only open question was as to the mode of doing it; a mode lawful in itself is regularly submitted; whereupon fifteen declare that, though the law has imposed the duty on them, they entertain so strong an objection, on grounds of conscience, to the law, that they refuse entirely to concur in obeying it. What must be the consequence? Must the law be set at nought and its requirements be disregarded, or must not those who stand aloof be considered as refusing to assist in the execution of their duty, and leaving it to be done by the minority which is desirous of doing what is right?

"The learned judge so often referred to, put the case of a mandamus (1), 'to do an act ordinarily and legally done by certain persons, as to put a corporate seal to an instrument.' The case supposed of course excludes the notion that the seal is in the custody of a particular officer, and that, by the charter, he only can affix it, and that he refuses to do so. That would be a case of disobedience to be punished; but the act would *de facto* remain unperformed. But, if the act were properly to be done by the majority, and the greater number of those present refused to concur, but the lesser number did in fact affix the seal, we should feel no difficulty in saying that the seal was well affixed; that the corporation had obeyed the writ, though the contumacious individuals might have laid themselves open to proceedings for contempt.

"In the case now before us, it was the duty of the chairman to have refused to take the sense of the vestry on that which was called an amendment. But his allowing the question to be put cannot enlarge the powers of the vestry, nor prevent the opposing party from voting on such matters duly proposed as were within the purpose for which they were assembled. If the punishment of interdict for refusing to make a rate were now available, might not a minority prevent the infliction of so heavy a sentence by acting as they have done here, or could they be stopped, because the chairman had suffered a vote to be taken on an insensible and irrelevant motion?

(1) *Veley v. Gosling*, 3 Curt. 300.

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Assent of pa-
rishioners to a
rate will
sometimes
cure previous
illegality, or in-
formality.

Where church-
wardens have
authority to
make a rate
under the
Church Build-
ing Statutes.

A rate for
the consecra-
tion of a church
rebuilt without
a faculty under
stat. 59 Geo. 3.
& 134. s. 40.
is valid.

"It has been observed by high authority (1) that 'this rate was not proposed to the vestry, nor put by the chairman to the vestry; there was no voting of any kind thereon.' We are dealing now only with the record; and that states that, after the show of hands taken on the supposed amendment, 'the question was then and there put,' which must mean regularly put by the proper authority, 'whether any other amendment was proposed?' No amendment was upon that moved, nor was the original motion formally again moved. In strictness of form this ought to have been done; but, if the first amendment was in effect a withdrawal of the majority from the meeting, as we clearly think it was, the repetition of the terms of the original motion would have been merely useless. To those who had deliberately declared, the moment before, that they would make no rate whatever, the question, whether they would make a rate of 2s. in the pound, could only have exposed the chairman to ridicule; it was already decided in the negative, for the reason assigned.

"Upon the whole, we are of opinion, that this rate was well made; and, consequently, our judgment must be for the defendants."

The assent of parishioners to a rate will sometimes cure previous illegality or informality: thus, if a rate be illegally imposed by a commission from the bishop, which he has no authority to issue (2) without the parishioners' consent, yet if it be afterwards assented to, and confirmed by the major part of the parishioners, that will make it good. (3)

In *Rex v. St. Mary's, Lambeth (Churchwardens of)* (4), where the inhabitants of a parish made an application to the commissioners for building new churches, conformably to stat. 58 Geo. 3. c. 45. ss. 14. & 60. & stat. 59 Geo. 3. c. 134. s. 24., and in consequence thereof obtained a loan for the purpose of building churches within the parish: — It was held, that the churchwardens might make a rate for repaying the interest and principal, as directed by stat. 58 Geo. 3. c. 45. s. 61., without any further consent of the parishioners to such rate, and that the making of such rate was not a matter of ecclesiastical cognisance, Lord Tenterden observing, "There is no doubt upon the sixty-first, compared with the other sections, that the churchwardens have authority to make the rate. They cannot borrow money of the commissioners under these acts, unless an application to them shall have been agreed to by the vestry, and not dissented from by one third in value of the proprietors within the parish. But unless the churchwardens had authority to make a rate, the vestry and proprietors might consent to the application, and afterwards declare, that they would never pay the money borrowed. As to the first objection, making a rate to pay a debt, under these circumstances, is not a matter of ecclesiastical cognisance."

In *Warner v. Guter* (5) it was holden, that a church rate for defraying the expense of the consecration of a church rebuilt under stat. 59 Geo. 3. c. 134. s. 40. was valid, although no faculty had been granted; Sir Herbert Jenner observing, "I think it now perfectly clear, that the proper consents were obtained, within the 40th section of the act, and that the libel and the additional articles are proper to be admitted."

(1) *Veley v. Gosling*, 3 Curt. 298.

(2) *Gibson's Colex*, 196.

(3) *Watson's Clergyman's Law*, 395.

(4) 3 B. & Ad. 651.

(5) 2 Curt. 315.

"The libel pleads, that on the 26th of March, 1835, a vestry meeting was held pursuant to notice, when it was resolved to take down the old church and rebuild a larger church nearer to the body of the village; and that, in pursuance of this resolution, a new church, affording better accommodation to the parishioners, was built on a more suitable site, the expense being borne by a subscription, aided by the Church Building Society; that on the 22d August, 1836, the new church was consecrated, and was resorted to by the parishioners as the parish church; that on the 18th August (prior to the consecration), a vestry meeting was called by regular notice, to make a rate for general church purposes; that a rate of one shilling in the pound, to meet the expenses of opening the new church, was agreed to; that the greater part of the inhabitants had paid the rate; and that Mr. Gater had been duly assessed in 10*l.* 9*s.* 5½*d.*, and had refused to pay the same.

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Jenner in *War-
ner v. Gater*.

"When the libel was before the Court on the former occasion, some important questions arose, as to the authority of the parish to pull down and rebuild the church; whether or no a faculty was requisite? And these questions were a good deal discussed; and the Court, considering that difficulties might arise, and that it might be exceedingly inconvenient if it held the opinion that in this case a faculty was necessary for the transfer of the parish church to a different site, suggested whether it might not turn out that it was done under one of the Church Building Acts, which might take it out of the usual course of the general law. Accordingly, inquiry has been made, and this turns out to be the fact, and additional articles have been brought in, pleading that the consents of the necessary parties had been obtained, letters from the bishop of the diocese (the ordinary) and from the patron of the living being annexed, and the incumbent having been himself the chairman at the vestry, and the other conditions of the 40th section of the 59 Geo. 3. c. 134. having been complied with. What does the act provide? That the churchwardens, with the sanction of the vestry and the consent of the ordinary, the incumbent, and the patron (there being no lay impropriator here), may pull down and rebuild the church on the same or another site. They got the consent of the vestry by the vote, the consent of the ordinary and of the patron are also obtained, and the incumbent was chairman of the meeting; and it also appears, from the additional articles, that half of the additional accommodation has been set apart as open sittings, so that it seems to me that all the provisions of the act of parliament have been complied with, and that this church has become the parish church of Botley.

"Then the question is, whether the rate was properly made or not? The first objection is, that there was not sufficient notice of the purpose for which the vestry was assembled; it was 'for making of a church rate and other purposes.' Certainly there is no specification of the exact object or purposes to which the rate was to be applied; but there is a notice that the meeting was to be for the making of a church rate, and it is hypercritical to say that every particular circumstance and object is to be stated in the notice. Mr. Gater was present at the meeting, and he proposed a rate of a fourth part of what was proposed by the churchwarden; but a shilling rate was carried by a large majority of the vestry, for the purpose of making provision for the consecration of the church. I am of opinion, therefore,

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Sir Herbert
Jenner in *War-
ner v. Guter*.

A rate for the
consecration of
a church is one
which it is in-
cumbent on the
parishioners to
make.

A select vestry
appointed pur-
suant to stat. 59
Geo. 3. c. 134.
s. 30. has no
power to im-
pose a rate for
the repairs of
the district
church.

Judgment of
Lord Tenter-
den in *Cockburn
v. Harvey*.

that the notice was sufficient, and that no one could have been taken by surprise.

"Now, the rate was for the consecration of the parish church, and it could not be a parish church till it was consecrated; and I should be glad to have it pointed out to me by whom the expense of consecration was to be defrayed. There is nothing in the resolution of the vestry that it should be defrayed by voluntary subscription. If the church had been rebuilt on the same site, still it would not have been a parish church till it was consecrated, and the parish must have been charged with the expense of consecration of such a church. I am of opinion, that a rate for consecration of the church is one which it was incumbent on the parishioners to make, and being levied by a large majority of the vestry (all but two), I think it is a legal and valid rate, and that every parishioner is bound to contribute to it; and being of opinion that it is a good and valid rate, legally and validly made, I shall hold, if the facts stated in the libel are proved, that Mr. Guter is liable to the rate; I, therefore, admit the libel and additional articles."

In *Cockburn v. Harvey* (1) it was holden, that a select vestry, appointed pursuant to stat. 59 Geo. 3. c. 134. s. 30., had no power to impose a rate for the repair of the district church; Lord Tenterden observing, "This case depends upon the construction of the 30th section of the 59 Geo. 3. c. 134. The church was built under the powers of the act of the 58 Geo. 3. c. 45; by the 70th section of which it is enacted, 'that the repairs of all such district churches or chapels shall be made by the districts to which they respectively belong, by rates to be raised within the district, in like manner as in case of repairs of churches of parishes; and every such district shall be deemed in law a separate and distinct parish for that purpose.'

"Rates for the repairs of churches in parishes, by the common law, are to be made by the churchwardens and the vestry, that is, by the churchwardens and inhabitants in vestry assembled, if there be not a select vestry established by usage, or act of parliament. So that, if this statute had remained unaltered, the rate in question being made by the churchwardens and persons acting as a select vestry, would undoubtedly be bad. A select vestry, for purposes connected with the church, is established by the 30th section of the 59 Geo. 3. c. 134., which enacts 'that in every district, parish, &c. in which any church shall be built, acquired, or appropriated, under the provisions of the said recited act (2), or this act, in which there shall not be a distinct vestry belonging to such district or division, a select vestry, consisting of so many persons as shall be directed by the commissioners in that behalf, shall be appointed by the commissioners, with the advice of the bishop of the diocese, out of the substantial inhabitants of the district, &c., for the care and management of the concerns of the church or chapel, and all matters and things relating thereto; and such select vestry shall annually elect or appoint the churchwarden or chapelwarden to be named on the part of the parish or chapelry, and shall elect new members of such vestry as vacancies may arise by death, resignation, or ceasing to inhabit the parish; and proper pews shall be assigned and provided in every such church for the use of the churchwardens thereof.'

(1) 2 B. & Ad. 797.

(2) Stat. 58 Geo. 3. c. 45.

"It was contended for the plaintiff, that the powers given to the select vestry by that section did not extend to the making a rate for the repairs of the church; and it was urged, that acts of parliament by which any charge may be brought upon the subject, or the subject be deprived of his rights in derogation of the common law, are to be construed strictly; and several cases were quoted in support of that proposition, I shall notice only two of them, as we consider the principle to be clear. In *Fludyer v. Lombe* (Sir T.) (1) Lord Hardwicke (then chief justice of this Court) says, 'It has been rightly said, that this being a law to take away people's franchises, should be strictly construed.' So in the case of *Buckeridge v. Flight* (2) Mr. Justice Holroyd says, 'Where acts of parliament vary, or take away the rights of parties, they ought to be strictly construed.' Many cases on the construction of the Stamp Acts have been determined upon this ground. And this principle must be kept in view in putting a construction upon this 30th section. Under the authority of this section the select vestry was established; and such vestry, therefore, must have the care and management of the concerns of the church, and all matters relating thereto; and the question is, whether the power of making church rates be included in those words, and given thereby? Now, there are many concerns of the church, and many matters relating thereto, independent of the making rates for its repairs; and the power of making such, not being expressly given, can only be deemed to be given by inference and implication, if it be given at all. And, accordingly, the argument for the defendants put their case on that ground; and it was urged, that the inconvenience of allowing the power to make a rate to exist in a body distinct from the persons who have the care and management of the concerns of the church, would be so great, that the legislature must be understood to have intended to give that power by the general words used on this occasion. The Court, however, can know the intention of the legislature only from the language of a statute, and it is to interpret that language according to the rules and principles of law. The inconvenience in this case does not appear to be greater than that which must take place under the stat. 59 Geo. 3. c. 12., whereby a select vestry may be appointed for the concerns of the poor, leaving the power of making rates to the persons who before possessed it, that is, to the churchwardens and overseers.

"The 10th section of the 3 Geo. 4. c. 72. does certainly afford an argument in favour of the defendant's; for it is thereby enacted, that in every case in which a parish shall be divided into separate parishes for ecclesiastical purposes, or separate districts, in which select vestries shall be appointed by the commissioners, all the members of the select vestry of the original parish, residing in the district of the original church, &c., shall continue to act as the vestry of such district and church, in all matters relating to such church and the repairs thereof, or to any other ecclesiastical matters, or in distributing any proportion of any charities, &c. which may, under this act, be assigned to such district, provided that no member of any select vestry of such parish shall, after such division, act in any matters relating to any church, &c., or any repairs thereof, or any matters relating thereto, except such as are within, or relate to the division

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(1) C. T. II. 307.

(2) 6 B. & C. 49.

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CANNOT, MAKE
A RATE.

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Lord Tenter-
den in *Cockburn*
v. *Harvey*.

Where a major-
ity of a select
vestry must at-
tend to con-
stitute a legal
body.

Rate drawn up
by churchwar-
dens alone.

RATE, WHEN TO
BE MADE.

Rate should be
made before
the expense is
incurred.

Under stat. 59
Geo. 3. c. 134.
s. 14. church-
wardens cannot
raise a loan on
the credit of
the church
rates to pay a
debt for repairs
incurred in a
past year.

in which he shall reside; and that all members of the select vestry of such parish, resident in any other divisions of such parish, shall be members of the vestries to be appointed for the divisions where they reside. But it is obvious that this section is confined in terms to the previous existence of a select vestry in the original parish; and it is by no means a necessary consequence, that because the legislature thought fit to give the power of making rates (assuming such powers to be thereby given) to the select vestry of a new parish taken out of an old parish, wherein a select vestry had that power before, therefore the select vestry of such a new parish shall have that power, where it was not previously vested, in a body of the same description in the old parish; so that the giving of that power, in a case like the present, can at most be considered only as a matter of doubtful, and by no means of necessary, or even clear implication. For these reasons we are of opinion the judgment of the Court must be for the defendant."

The commissioners for building and enlarging churches having, pursuant to the statutes 58 Geo. 3. c. 45. & the 59 Geo. 3. c. 30., appointed twenty-six persons to be a select vestry for the care and management of a church and all matters relating thereto, it was held, that in order to constitute a good assembly of the select vestry so appointed, there must be present a majority of the number (viz. fourteen) named in the appointment; and, therefore, that a rate for the repair of the church, made at a meeting where there was not such a majority, was illegal, and that payment of such a rate could not be enforced in the Ecclesiastical Court. (1)

The parishioners in vestry assembled having passed a resolution, that a rate should be made, the fact of the rate itself not being then made, but drawn up subsequently by the churchwardens alone, will not vitiate the rate. (2)

3. RATE, WHEN TO BE MADE.

The rate should be made before the expense is incurred, because the propriety and extent of the repairs should be determined before they are undertaken. And no church rate can be legally made for the reimbursement of a churchwarden, because that would be to shift the burthen from the parishioners at the time to future parishioners. (3)

In *Rex v. Dursley (Churchwardens of)* (4) it was held, that under stat. 59 Geo. 3. c. 134. s. 14. churchwardens could not raise a loan on the credit of the church rates, to pay a debt for repairs, which was incurred in a past year: that the loan ought to have been raised at the time when the repairs were done; and that the laying of the rates for the repayment should have commenced immediately and have been continued, so as to have paid off the debt by ten annual instalments: Lord Denman observing, "It appeared, among other facts, that the repairs in question had been done in the years 1824, 1825, and 1826, at an expense of 1585*l.*; that in 1832, the sum of 350*l.* remaining unpaid, the applicant had been asked to lend that

(1) *Bluckett v. Blizzard*, 9 B. & C. 851.

(2) *White v. Beard*, 2 Curt. 480.

(3) *Rex v. Bradford (Churchwardens of)*, 12 East, 576. *Dawson v. Wilkinson*, C. T. H. 381. *Barton v. Wilby*, Andr.

11. *Chesterton v. Farlar*, 1 Curt. 345. *Rex v. Silifant*, 4 A. & E. 361. *Ellis v. Griffiths*, 2 Curt. 673.; *sed vide post*, 1168. *Bull v. Fellows*, 3 Curt. 680.

(4) 5 A & E. 10.

sum, and had done so, receiving a deed of charge, regular in form, and with the necessary consent of the bishop, incumbent, and vestry. One instalment of the principal and interest had been paid in 1833, and the interest to August, 1834.

RATE, WHEN TO
BE MADE.

Judgment of
Lord Denman
in *Res v. Durs-
ley* (Church-
wardens of).

"It was objected, on showing cause, that the section in question (1) does not authorise the borrowing money and charging the rates retrospectively. We have considered this objection: and although the words of the statute are in this respect general, we are of opinion, that it must prevail.

"It is a general rule with respect to parish rates, founded on obvious principles of policy and justice, that they are not to be made retrospectively. The payers being a fluctuating body, nothing, generally speaking, is more just, or more likely to conduce to economy, than to hold, that they who create a charge shall themselves bear it. The statute has, to a certain extent, modified this general rule; and the churchwardens are authorised, with the sanction of the vestry, bishop, and incumbent, to borrow, on the credit of the rates, such sum of money as shall be necessary for defraying the expense of repairing the church; and they are then empowered and required to raise, by rate, a sum sufficient from time to time to pay the interest, and not less than ten per cent. of the principal, until the whole of the money so borrowed shall be repaid.

"It appears to us, that all these provisions point clearly to the limits of departure from the general principle above stated. The consent of the incumbent and bishop appear to have been thought necessary, in order to see that the repairs should be of that onerous and yet permanent nature, which might properly be thrown in part on the payers of succeeding years. Their consent, and that of the vestry, have the effect also of securing the parish from an improvident outlay; and, finally, the provision, that the principal and interest shall be paid in ten instalments, which ought, in our opinion, to be annual, secures the participation of the existing rate-payers in the discharge of the loan, and prevents it from becoming a burthen, at any indefinite period, on their successors.

"These obvious purposes of the act, so necessary to prevent abuses of the power given by it, can only be secured by an adherence to the general rule stated above, in all particulars not specially provided for by the clause. We are, therefore, of opinion that the rate now sought to be imposed would not be authorised by the statute, and of course that the present rule must be discharged."

The foregoing principle that stat. 59 Geo. 3. c. 134. s. 14. will not authorise the borrowing of money upon the credit of the rates, for the payment of sums previously expended, was subsequently acted upon in *Piggott v. Bearblock* (2), where it was held, that if a rate be made, which is in part only for the purpose of repaying the amount borrowed for such purposes, it is, nevertheless, illegal: Lord Brougham observing, "It is not necessary that the Court should decide upon the questions raised in the course of the argument as to the liability of the inhabitants of Romford as parishioners of Hornchurch, or as to the due publication of any of the notices required by law; for we have no option but to reverse the decision of the Court below, upon the more material ground, that the payment out of the rates of money

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Lord Broug-
ham in *Piggott
v. Bearblock*.

(1) Stat. 59 Geo. 3. c. 134. s. 14.

(2) 8 Jurist, 479.

**RATE, WHEN TO
BE MADE.**

previously borrowed or expended is illegal, and will vitiate those rates. An illegal payment of any amount, however small, will have that effect. In Hampden's celebrated case, the illegal amount was but a few shillings; but take the accounts in any way, it will be found that the sums objected to constitute a sixth of the whole rates. The case of *The King v. Dursley (Churchwardens of)* (1) is conclusive; for if the mandamus had been granted, it would have been equivalent to a declaration, that the rate in question was good; but the mandamus having been refused, the conclusion is equally clear, that the rate was bad. The Court in that case did not make or lay down any new law, but only declared the law as it existed before the statute,—that the rate, if retrospective, was bad. Upon this ground we have come to the conclusion, that we have no option but to reverse the judgment appealed from, including of course that part which condemns Mr. Piggott in the payment of costs in the court below; but as he has defended himself, and, therefore, incurred but trifling expenses on his own account, we do not think it necessary, under the circumstances, to make any award of costs to him."

The repairs being authorised by the vestry meeting does not absolve the churchwardens from the consequences of neglecting to make a prospective rate.

The circumstance of the repairs being authorised by a vestry meeting, does not absolve churchwardens from the consequences of neglecting to make a prospective rate to discharge the expense; and although where the parishioners who attended such vestry signed the resolutions for the repairs, it was held that would not make them individually liable, as they merely acted, in their character of vestrymen, without any intention to render themselves personally liable, or separately from the rest of the parishioners. (2)

And although one who attended and signed, afterwards directed the mode in which certain parts of the repairs should be effected, it was held, that such directions were not sufficient to imply an individual contract by him. (3)

Court of equity will not decree a retrospective rate to be made to reimburse a former overseer for payments out of pocket.

Where a bill was filed by a churchwarden, praying that an account might be taken of all sums paid by him, and to which he had become liable for the repairs, and that a vestry might be called to make a rate for the payment thereof, it was dismissed with costs, because it was not a prospective rate; and a court of equity will not decree a rate to be made to reimburse a former churchwarden monies laid out, whilst in office, in pursuance of a vestry order. (4)

Spiritual Court cannot enforce a rate for reimbursement.

Although the Spiritual Court may compel a church rate for the purpose of repair, it must follow the law, and cannot compel a rate for reimbursement. (5)

**PERSONS AND
PROPERTY
LIABLE TO BE
ASSESSED.**

Residence, or
occupancy.

4. PERSONS AND PROPERTY LIABLE TO BE ASSESSED.

In *Woodward v. Makepeace* (6) it was held, that a person was an inhabitant where he occupied the land, as well as where he personally resided.

(1) 5 A. & E. 10.

(2) *Lancaster v. Tricker*, 1 Bing. 201.
8 Moore, 20.

(3) *Lancaster v. Fricker*, 9 Moore, 688.
2 Bing. 251.

(4) *Lancaster v. Thompson*, 5 Madd. 4.

(5) Ibid. 12.; vide etiam *Giffin v. Ellis*
11 A. & E. 743.

(6) 1 Salk. 164.

Secondly, that although he did not personally live in the parish, yet, by having lands there in his hands, he was taxable, and with respect to the recasting of the bells for which the defendant had refused to pay the rate, because they were but ornaments, Chief Justice Holt said, "If he be an inhabitant as to the church, which is confessed, how can he not be an inhabitant as to the ornaments of the church?"

Where lands are in farm, the tenant must pay the rates; for the receipt of the rent does not make the lessor a parishioner. (1)

Under stat. 58 Geo. 3. c. 45. ss. 70 & 71. the inhabitants of the district are liable to be assessed to the incidental expenses of repairing district churches or chapels for twenty years, precisely in the same manner as to the repairs of the mother church; if it were otherwise, the necessary consequence would be great inconvenience and confusion. (2)

By stat. 17 Geo. 2. c. 37., if there be any dispute, in what parish or place, improved wastes and drained and improved marsh lands lie, apurthues arising therefrom, mines therein, and saleable underwoods, are to be rated to all parish rates within such parish and place as lies nearest to such lands; and if on application to the parochial officers, to have them rated, any dispute arise, the justices of the peace at the next sessions after such application made, and after notice given to the officers of the several parishes and places adjoining to such lands, and to all others interested therein, can hear and determine the same on the appeal of any person interested, and cause the same to be equally assessed, whose determination therein will be final.

In *Craven v. Sanderson* (3) it appeared, that an inhabitant of the parish of Wakefield was libelled for non-payment of rates imposed for the repair of the parish church, and of certain chapels built within the parish, under stat. 58 Geo. 3. c. 45., stat. 59 Geo. 3. c. 134., and stat. 3 Geo. 4. c. 72. He declared in prohibition, alleging that the rate was improperly laid on a part of the parish only, excluding the township of Horbury. It was pleaded, that the chapels were built in aid of the parish church; that there had immemorially been a chapel in Horbury, at which the inhabitants of Horbury had received all divine rites and services; that the costs of repairing the chapel had been immemorially defrayed by the inhabitants of Horbury, and no others; that from time, &c. no rate for repairing the parish church had been laid on any person in Horbury; and that the inhabitants of Horbury had from time, &c. been exempt from contributing to the repairs of the parish church; and a verdict was given for the defendants on a traverse upon this plea.

Upon such facts it was held, on motion for judgment non obstante veredicto, that the Court must, after verdict, intend the chapel to have been coeval with the church (although that fact was not pleaded); and that the chapel and church being coeval, and the inhabitants having always been exempt from the church rate, no rate for repairing the church could now be imposed upon them; also that, under stat. 3 Geo. 4. c. 72. s. 20., which directs that chapels built under that act, or stat. 58 Geo. 3. c. 45. & stat.

PERSONS AND
PROPERTY
LIABLE TO BE
ASSESSED.

Tenant, not
owner, charge-
able.

Where the in-
habitants are
liable to be
assessed for in-
cidental ex-
penses under
stat. 58 Geo. 3.
c. 45. ss. 70 &
71.

Stat. 17 Geo. 2.
c. 37.

Disputed waste
lands near pa-
rishes.

When it will
be presumed
that a chapel
was coeval with
a church, and
that those who
repaired the
chapel had been
exempt from re-
pairing the
church.

(1) *Acron*, 4 Mod. 148.

(2) *Chesterton v. Furlar*, 1 Curt. 356.

(3) 7 A. & E. 880.

PERSONS AND
PROPERTY
LIABLE TO BE
ASSESSED.

Judgment of
Lord Denman
in *Craven v.
Sanderson*.

59 Geo. 3. c. 134., shall be repaired by the parishes or places at large to which they belong, the new chapels mentioned in the above pleadings were repairable by the district which repaired the church, viz. the parish of Wakefield minus the township of Horbury; Lord Denman observing, “ This was a suit in prohibition to restrain the parish officers of Wakefield from enforcing a rate for the repair of the parish church, and of three chapels belonging to three townships within the parish, two of which chapels were appropriated to districts under the Church Building Acts, and one was not so appropriated. The rate was imposed on all the occupiers within the parish except those within a fourth township called Horbury. The question was, Whether they were properly omitted from the rate? The jury found a verdict in the defendant’s favour at the summer assizes in 1834, and again in substance the same verdict on a new trial in the spring of 1836, though the plea had undergone some amendment. We are to determine whether the amended plea states a legal exemption for that township from the common law liability to be taxed for the reparation of the parish church. The replication, on which the parties went to the country, after stating that the chapels of the three other townships were not built in aid of the parish church (on which, however, no dispute was raised), further alleged, in denial of the plea, that there is not, from time whereof the memory, &c., a church or chapel within Horbury, at which the inhabitants of that township receive, and have immemorially received, all manner of divine rites and services, and that the costs and expenses of repairing the said church or chapel, and of providing necessities for the performance of the same, have not from time immemorial been defrayed by rates and assessments on property in Horbury; and that the inhabitants of Horbury are not exempted from repairs of the parish church, but ought to be rated and assessed thereto. Then does the affirmative of these facts establish the exemption contended for?

“ The plaintiff’s argument was, that all may be true, and the township of Horbury may, notwithstanding, have had a church or chapel originally built in aid, or (as it is sometimes expressed) in ease, of the parish church. It was said that, even before time of memory, the parish might be first created, and the church erected, and afterwards the chapel built; that all parochial rites may have been performed there, the inhabitants of the township taking upon themselves exclusively the burden of repairing it; in which state of things the defendant did not dispute that the liability to contribute to the repairing of the church would not be taken away.

“ The plaintiff referred to 1 Gibson’s Codex, 197. ed. 1761. (1) No reference was made to the Constitution of Othobon, which is copied in the same volume, p. 209. ed. 1761 (2), ‘ De oblationibus capellarum restituentis ecclesiæ matriæ;’ which enjoins restitution of offerings from chapels to parish churches, by chaplains called ‘ ministrantes in capellis hujusmodi, quæ salvo jure matriæ ecclesiæ sunt concessæ;’ which passage shows, that chapels have existed without the reservation of any privilege to the mother church, or rather that a parish church and a chapelry may exist within the same parochial boundaries, without the relation of mother and offspring, but independent of each other, and most probably coeval.

(1) P. 221. ed. 1713. (2) P. 235. ed. 1713.

PERSONS AND
PROPERTY
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"In the other place above mentioned, Gibson's text is no doubt strong in its import; but it is needless to observe, that that writer is not to be considered as an authority. The passage is made up of extracts from cases decided in our courts, from which it will be found extremely difficult to deduce any rule of law whatever. In some it is said, that a ground of exemption must be stated in pleading; in others that the exemption should be directly averred, and that if it is qualified with 'ratione inde' it will be bad. In some cases it is holden, that to leave out of a church rate certain parishioners or districts is no ground for prohibition; in others the writ has been granted for that reason without any hesitation. In a case between *Aston and Castle Birmidge* (1) the Court held, that the inhabitants of a chapelry sued for a rate raised for repairing a parish church, did not entitle themselves to a prohibition by showing that they had, in fact, repaired their chapel, and had performed there the rites of baptism and marriage, if they buried at the parish church. On all hands it was agreed, that the mere fact of repairing their own place of worship gave no exemption. These authorities could hardly have supplied any safe rule for the decision of the present case; but at a later period Lord Holt had to deal with a case, the circumstances of which were almost identical with *Aston v. Castle Birmidge* (2); and though there was no necessity for laying down the principle on which legal exemptions must depend, yet he has explained it in a clear and satisfactory manner. In *Ball v. Cross* (3) he said, 'that by common law the parishioners of every parish are bound to repair the church.' 'In the principal case, those of a chapelry may prescribe to be exempt from repairing the mother church, as where it buries and christens within itself, and has never contributed to the mother church; for in that case it shall be intended coeval, and not a latter erection.' But he observed, 'that the chapel could be only an erection in ease and favour of them of the chapelry; for they of the chapelry buried at the mother church till Henry the Eighth's time, and then undertook to contribute to the repairs of the mother church.' We have then the opinion of this learned judge, at a time when the doctrine of prohibition was far from obsolete, that, where the chapelry has from beyond memory performed all its own parochial rites and services, it shall be intended coeval and exempt from contribution; and such is the effect of the plea. It might, perhaps, be argued, that the fact of its being coeval ought to have been pleaded, and the opinion of the jury taken upon the proof; but in truth it seems much more reasonable to say, that the law will presume its independence and coeval antiquity from facts susceptible of clear proof, which cannot be conceived to have existed if it were a mere chapel of ease. At any rate, if that fact is necessary to constitute exemption, it must be taken, after verdict, to have been proved to the satisfaction of the jury, who would unquestionably have drawn the inference from what they must have found in sustaining the defendant's plea.

"Another point was made on the effect of the Church Building Acts, in connexion with a local act for the parish of Wakefield, set out in the pleadings. That act, passed in 55 Geo. 3., enacts, that the parish church of Wakefield and a chapel of St. John, in Wakefield, are to be repaired by a

(1) Hob. 66. 2 Rol. Abr. *Prohibition*
(11), 282. pl. 7.

(2) Ibid.

(3) 1 Salk. 161. Holt, 138.

**PERSONS AND
PROPERTY
LIABLE TO BE
ASSESSED.**

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in *Craven v.
Sanderson*.**

rate, without saying on whom the rate is to be levied. The declaration also alleges that three new chapels have been, under the statutes of 58 & 59 Geo. 3., built within the parish. Now the 58 Geo. 3. c. 45. s. 70. imposes the repair of district churches and chapels on the districts to which they may be assigned. The 59 Geo. 3. c. 134. s. 14. authorises and empowers churchwardens of any parish, with consent of the vestry, to raise money for the repair of any churches or chapels (*i. e.* any within the parish), on the credit of the rates; and then 3 Geo. 4. c. 72. s. 20., reciting that ‘doubts may arise as to the repairs of churches or chapels’ built under the provisions of the two former acts, or of this act, ‘for remedy and prevention thereof’ (*i. e.* of the doubts), enacts (his lordship then read the 20th section of stat. 3 Geo. 4. c. 72.). From these clauses in the three acts taken together, a right is claimed to rate the parish at large (of course including Horbury), for the repairs of the district chapels; as neither by the Church Building Acts, nor by the local act, is any express provision made relating to the levy of rates. And, if this liability had been thrown on ‘parishes’ at large without ‘places,’ the words could hardly have been satisfied by any other construction. But the addition of that word shows, that other divisions besides parishes were considered capable of coming under the Church Building Acts; and the studious preservation of all laws then in force seems to keep the power of imposing rates precisely as it was then actually existing in each place. The place, then, for which rates may be imposed in respect of the new chapels in Wakefield, is the whole parish minus Horbury; for the law then in force excluded it from the parish for that purpose. We therefore think the plea good, as disclosing a substantial defence at common law, and open to no objections from the recent statutes.”

**Hall of a com-
pany.**

The hall of a company being rated to the repairs of a church, the Spiritual Court may proceed against the master and wardens of such company for non-payment. For the Spiritual Court has no other process than by citation, which cannot be executed upon an aggregate corporation; and therefore the officers of the corporation must be cited, to whom it belongs to pay the tax, and the rate paid by them must be allowed in their accounts. (1)

**Governor of
Greenwich
Hospital.**

The governor of Greenwich Hospital, (an institution founded in 1694, and part of an ancient royal demesne, to which an unconsecrated chapel, chaplains, and a burial ground are attached, but the officers of which occasionally bury, christen, marry, have pews at, and resort to, the parish church, and vote at the vestry,) was held liable to be assessed to the church rates for premises in his beneficial occupation as governor, although these premises had never been so rated, because no valid ground of exemption was shown to found a prescription. (2)

**Omission of
traders from
rate.**

In *Miller v. Bloomfield* (3), where an allegation responsive to a libel pleaded a church rate including “stock in trade,” and suggested, 1st, that the parishioners were omitted to be rated for “shipping;” and, 2dly, that several parishioners, possessed of stock in trade, were altogether omitted to be rated—it was directed to go to proof.

(1) *Thursfield v. Jones*, Jones (Sir T.), 187.

(2) *Smith v. Keats*, 4 Hagg. 275.

(3) 1 Add. 499. 2 Ibid. 30.

A person cannot be charged in the parish where he inhabits, for land which he has in another parish, to the reparation of that church where he inhabits, for then he might be twice charged, but he can be charged for it in the parish where the land lies. (1)

And therefore the rate must be laid upon all lands within the parish, although the occupiers inhabit in another parish; which point was settled in *Jeffrey's case* (2); where it was also resolved (pursuant to the written opinions of civilians) that such occupation of land made the occupier a parishioner, and entitled him to come to the assemblies of the parish, when they assembled together for such purposes; and it was said, that if such lands were not liable to be rated, a person who inhabited in one parish might occupy the greatest part of the lands in another parish, and so churches might come to ruin. The authority of the case was upheld in *Paget v. Crumpton* (3), in which a prohibition was obtained upon a surmise that the person rated lived not in the parish; but upon *Jeffrey's case* being cited, Chief Justice Popham changed his opinion, and it was resolved by him and the whole court, that a consultation should be granted; and Lord Coke says, this is generally allowed and received for law. (4)

If a petty chapman take a standing, for rent to be paid by him, in the waste of the manor within the market, for two or three hours every market day, to sell his commodities, the market being holden there one day every week, but inhabits in another parish, he cannot be rated to the reparation of the church for this standing. (5)

It is said that the patron of a church, as in right of the founder, may prescribe that in respect of the foundation he and his tenants have been freed from the charge of repairing the church. (6)

The rectory, or vicarage, which is derived out of it, are not chargeable to the repair of the body of the church, steeple, public chapels, or ornaments, because the rector is at the charge of repairing the chancel. (7)

But an improPRIATOR of a rectory or parsonage, though bound to repair the chancel, must contribute to the reparations of the church, in case he has lands in the parish which are not parcel of the rectory. (8)

The inhabitants of a precinct where there is a chapel, though it is a parochial chapel, and that they repair it, are nevertheless of common right contributory to the repairs of the mother church. If they have seats at the mother church, to go thither when they please, or receive the sacrament or sacramentals, or marry, christen, or bury at it, there can be no pretence for a discharge. Nor can anything support that plea, but that they have time out of mind been discharged (which also is doubted whether it be of itself a full discharge), or that (in consideration thereof) they have paid so much to the repair of the church, or the wall of the

PERSONS AND
PROPERTY
LIABLE TO BE
ASSESSED.

Who not liable.

Persons not
chargeable for
land in another
parish.

Stall in a
market.

Exemptions of
patrons and rec-
tors.

Inhabitants of
a chapelry how
far exempted.

(1) 2 Rol. Abr. *Prohibition* (H), 289.
pl. 4.

(2) 5 Co. 67.

(3) Cro. Eliz. 659.

(4) Gibson's Codex, 196. Lyndwood
Prov. Const. Ang. 251. writes to the same
effect. — Illi qui morantur ad extra, ha-
bent tamen terras ad intra, censeri debent
inter parochianos illius ecclesie ubi sunt
terre et hoc intelligo verum, respectu

rerum et onerum realium quæ imminet
infra parochiam ubi possessiones sitæ sunt
non tamen respectu personarum "

(5) *Hollynes v. Kettering* (*Churchwardens
of*), cit. 2 Rol. Abr. *Prohibition* (H), 289.
pl. 5.

(6) Degge's P. C. by Ellis, 207.

(7) Ibid.

(8) Gibson's Codex, 197.

**PERSONS AND
PROPERTY
LIABLE TO BE
ASSESSED.**

churchyard, or the keeping of a bell, or the like compositions, which are clearly a discharge. (1)

It is stated in Godolphin, that "it is contrary to common right, that they who have a chapel of ease in a village should be discharged of repairing the mother church; for it may be that the church, being built with stone, may not need any reparation within the memory of man; and yet that does not discharge them, without some special cause of discharge showed." (2)

Stat. 58 Geo. 3.
c. 45. s. 31.
No division of
any parish into
separate pa-
rishes, or dis-
trict parishes,
to affect poor
or other paro-
chial rates.
Church rates
excepted.

By stat. 58 Geo. 3. c. 45. s. 31. "no division of any parish or extra-parochial place, whether it be divided into separate parishes with the consent of the patron and bishop of the diocese, or into district parishes, nor any thing in this act contained in relation thereto, shall affect, or in any manner be construed to affect, any parish or extra-parochial place so divided, or the persons residing therein, in any other respect than in this act particularly provided, or in any manner to apply to any poor or other parochial rates which may be raised in the parish or extra-parochial place so divided, or in any such separated parish or district parish, or to the maintenance or relief of poor persons, or to any title or claim to such relief, or to any powers relating to any such rates, or holding vestries, or appointment or powers of parish officers, or any such relief or claim thereto, or to any act or acts of parliament, or law or custom relating thereto, save and except as to church rates, in so far as the same are regulated by the provisions of this act; but the original parish shall to all such purposes remain and continue in law a parish to all intents, as if no such division thereof into separate parishes or district parishes had been made."

**MODE OF AS-
SESSMENT.**

5. MODE OF ASSESSMENT.

If legal exemptions do not exist, houses and lands, and property of that description, are, *prima facie*, liable to church rates. (3)

Rates a per-
sonal charge.

These levies are not chargeable upon the realty, but upon the person in respect of the realty; in some places, therefore, the rate will be assessed upon the amount of the land; in others, as in cities and large towns, upon the houses, where, of course, there is no land which can be specifically so charged (4): and the assessment must be estimated according to the value of the rent. (5)

Parishioners have no rule to guide them in making rates, but common estimation as to the value of property; mere inequalities in the taxation are not sufficient to set aside a rate. (6)

Rule of assess-
ment.

The presumption of law is, that a church rate made at a vestry duly holden, and the same as in former years, is fairly assessed, and the burthen of proof is upon the party objecting to payment on the score of inequality; and the presumption and burthen are both increased when the

(1) Gibson's Codex, 197. *Craven v. Sanderson*, 4 A. & E. 666.

(2) Godolphin's Repertorium, 153.

(3) *Smith v. Kents*, 4 Hagg, 279.

(4) Degge's P. C. by Ellis, 205. *Wat-*

kins v. Seaman, 2 Lutw. 1019. *Andrew v. Hutton*, Hetl. 130.

(5) Lyndwood, Prov. Const. Ang. 255.

(6) *Lilly v. Hardy*, 1 Lee (Sir G.), 52.

rate is founded on a valuation being acted upon both for church and poor rate. (1)

MODE OF ASSESSMENT.

A taxation by the pound rate is the most equitable way, and not according to the quantity of the land. (2)

A church rate made upon the same assessment as the poor rate, is a valid assessment. (3)

Church rate made upon the same assessment as the poor rate.

A poor rate assessed on the same principle over the whole parish, though affording a fairer criterion than king's taxes, is but adminicular evidence of the equality or inequality of a church rate. A valuation by competent judges, and founded on the rent a tenant would pay for the premises, is the proper test; therefore, an allegation pleading reasons why the poor rate did not afford a fair criterion, was rejected as immaterial, and an explanation of such matter in the answer was held to be sufficient. (4)

The assessors are not to tax themselves, but to leave their taxation to the residue of the parish. (5)

If a parish consist of several vills, and there be a custom to levy the rate in certain proportions, they must pursue it; for such a custom may be, or may have been, in its commencement, reasonable. (6)

Customs to be observed.

If a parish plead a custom for the rate to be assessed only for lands, and not for houses; or only for arable lands, and to be excused for their pastures; or only for their sheep walks, and not for the rest; the custom cannot be good: for, by the law, all lands and houses are to be equally rated; and their paying for some part can be no good cause for the discharge of the rest. (7)

By a constitution of Archbishop Stratford, all persons, as well religious as others whatsoever, having possessions, farms, or rents, which are not of the glebe or endowment of the churches to be repaired, living within the parish or elsewhere, shall be bound to contribute with the rest of the parishioners of the aforesaid churches, as often as shall be needful, to all charges incumbent upon the parishioners, concerning their church and the ornaments thereof, by law or custom, having respect unto the quantity of such possessions and rents; whereunto, as often as shall be necessary, the ordinary shall compel them by ecclesiastical censures and other punishments. (8)

To this rule there is one exception, viz. possessions, farms, or rents, which are of the glebe or endowment of the churches to be repaired (9); but if there be lands, &c. within the parish, belonging to another church, it seems they are not exempt. (10)

Glebe lands.

In making a church rate, the lessees of a market are to be assessed according to the real produce of the tolls, and not according to the rent only. (11)

Lessees of a market.

The omission in the rate of a person bound to pay, *prima facie*, makes the rate unequal; but if the person be too poor to pay, and the omission be

Omission in the rate of a person bound to pay.

(1) *Lambert v. Weall*, 4 Hagg. 102.

(2) *Wood's Inst.* 90.

(3) *Smith v. Dixon*, 2 Curt. 271.

(4) *Lambert v. Weall*, 4 Hagg. 96.

(5) *Godolphin's Repertorium*, Append. 10, 11.

(6) *Burton v. Wileday*, Andr. 32.

(7) *Ibid. Andrews v. Hutton*, Hetl. 130.

Anon. Latch, 203.

(8) *Lyndwood*, Prov. Const. Ang. 255.

(9) *Ibid.*

(10) *Ibid.*

(11) *Stowell v. Twyford*, 2 Lee (Sir G.), 150.

MODE OF ASSESSMENT.

to pay *prima facie* makes the rate unequal.

Rate not invalid from omissions of an inconsiderable amount.

Whether separate rate for ornaments.

When a church rate is or is not excessive.

made without fraud, and with the consent of the parish, it would not seem to be illegal. (1) In *Chesterton v. Farlar* (2), Dr. Lushington said, all property ought to be rated; but that it was not the duty of churchwardens to exact charities from persons in a state of pauperism.

A church rate is not invalid by reason of omissions of an inconsiderable amount, it being a question of degree; and where the rateable property was 8622*l.*, and property was omitted amounting to 200*l.*, the Court pronounced for the rate, but without costs. (3)

It is no objection to the validity of a rate, that the churchwardens might have obtained funds from other sources; nor that the rate, though assessed upon occupiers, is demanded of and paid by landlords. (4)

In some of the earlier authorities it is contended, that a separate rate must be made for the ornaments of the church, and that it is purely a personal charge, not referable to the land occupied (5); and that, therefore, persons having land in the parish, but residing out of it, are not liable to contribute towards the ornaments of the church. (6) But Sir Simon Degge says, that the foreigner who holds lands in the parish is as much obliged to pay towards the bells, seats, and ornaments, as to the repair of the church.

And he has seen (he says) a report under the hand of Mr. Latch, that it was resolved in *Willmot's case* (7), and in *Chester's case* (8), that a foreigner who held lands in another parish wherein he did not reside, was as much chargeable to the ancient ornaments of the church, as bells, seats, and the like, as those that lived in the parish; but that such landholders could not be charged to new bells, organs, or such like. (9)

A church rate is not excessive, if made for defraying the expenses of and for the current year, although such expenses may have been incurred before making the rate. (10)

An allegation in a suit for subtraction of church rate having been admitted, pleading that the rate in question, of nine-pence in the pound, was excessive; an allegation in reply, stating that upon a sixpenny rate being proposed by the churchwardens for absolute necessities, an increased rate of nine-pence in the pound was moved and carried, for the purpose of repairing the church bells, upon a calculation made at the time; was admitted as a sufficient explanation of such increased rate. (11)

In a suit for subtraction of a church rate of nine-pence in the pound, an allegation pleading, that the churchwardens having produced an estimate, and required a rate of six-pence in the pound, which would have been sufficient to meet all necessary demands, and that the rate of nine-pence in the pound, was excessive which, without any estimate, had been moved as an amendment, and carried,—was admitted as being *prima facie* an answer to such suit. (12)

In a suit for church rate it was objected, 1st. that the proceeding was

(1) *Thompson v. Sanford*, 3 Phil. 642. in not.

(2) 1 Curt. 345.

(3) 2 Ibid. 495.

(4) *Party v. Nunn*, 1 Notes of Cases Ecclesiastical, 191.

(5) 2 Rol. Abr. *Prohibition* (K), 291. pl. 1 & 2.

(6) *Lyndwood*, Prov. Const. Ang. 255. Gibson's Codex, 196.

(7) H. 6. Jac. B. R.

(8) 10 Jac.

(9) Degge's P. C. by Ellis, 205, 206, et vide *Crews v. Draper*, 1 Bulst. 20.

(10) *Bull v. Fellowes*, 3 Curt. 680.

(11) *Smith v. Dixon*, 2 ibid. 271.

(12) Ibid. 268.

for six rates at the same time; and, 2d. that the rates were made by persons delegated by the parishioners in vestry, but not made in vestry; such objections were however overruled. But an objection, that the minister's salary was included in the rate, such salary, amounting to one third of the whole rate, was sustained. (1)

MODE OF ASSESSMENT.

Objections to church rates, on the ground of inequality, tending to occasion great inconvenience and expense to parishes, are *stricti juris*, and the pleas must be confined to the points originally put in issue. A ratepayer, in his defensive allegation objecting to his assessment on the sole ground of being over-rated as compared with two others, cannot, in additional articles, introduce, as a fresh objection, that a railway passing through the parish has not been assessed. (2)

Objections to church rates are *stricti juris*, and the pleas must be confined to the points originally put in issue.

The Court pronounced for a church rate, and condemned in costs a ratepayer, who, as overseer of the poor, had collected rates, and had long acquiesced in the payment of church rates made on the same valuation as the church rate, but afterwards objected to the rate on the ground of inequality, such inequality not being established in evidence. (3)

Acquiescence in the mode of rating.

If any person find himself aggrieved at the inequality of his assessment for the church rate, his appeal is to the ecclesiastical judge, who is to see right done. (4)

Aggrieved parties can appeal to ecclesiastical judge.

6. WHERE A MANDAMUS WILL, OR WILL NOT, BE ISSUED.

WHEREA MANDAMUS WILL, OR WILL NOT, BE ISSUED.

The Court will grant a mandamus to the inhabitants of a parish liable to contribute to the church rate, to meet and assemble together, with the minister, to elect churchwardens. (5)

A mandamus will be granted to the inhabitants of a parish liable to contribute to a church rate to elect churchwardens.

Where the return to such a mandamus stated an immemorial custom in the parish to have no churchwarden, and that the duties appertaining by law to the office of churchwardens had been, from time out of mind, discharged by the overseers of the poor:—It was held, that inasmuch as overseers had not existed time out of mind, and as there were necessary duties appertaining to churchwardens, and there must have been some persons bound by law to discharge those duties, the custom set out in the return was bad. (6)

Where a statute exempted parishioners from tithes, and enacted that the churchwardens, &c. were to make a rate in lieu thereof, part of which was to be applied to the repairs of the church, and another statute substituted the vestry for the churchwardens, &c., and the vestry refused to make a rate, the Court compelled them by mandamus. (7)

When a vestry or other parochial body will be compelled to make a rate.

Where an act of parliament directs a body, created by the act, to levy church rates, the Court of Queen's Bench will compel them, by mandamus,

Where an act of parliament

(1) *Still v. Palfrey*, 2 Curt. 902.; vide also *Lee v. Chalcroft*, 3 Phil. 641.

(2) *Quere*. If the question whether such ratepayer was liable to be rated to church rates, could have been originally raised as a collateral, incidental point, by a party objecting to payment of his own rate on the ground of being overrated? *Lambert v. Weall*, 4 Hag. 91.

(3) *Ibid.* 102.

(4) *Degge's P. C.* by Ellis, 204.

(5) *Rex v. Wix (Inhabitants of)*, 2 B. & Ad. 197.

(6) *Ibid.*

(7) *Reg. v. St. Saviour's, Southwark (Churchwardens of)*, 7 A. & E. 925.

WHERE A MANDAMUS WILL, OR WILL NOT, BE ISSUED.

directs a body created by the act, to levy church rates, they will be compelled by mandamus.

When the writ lies to churchwardens of the united parishes under stat. 10 Ann. c. 11.

Money borrowed under Church Building Statutes.

Trustees appointed under a local act, with power to make rates for building a new parish church, will be compelled by mandamus to account to parochial auditors, under stat. 1 & 2 Gul. 4. c. 60.

to levy the rate, and will not confine the writ to ordering the body to assemble for the purpose of determining whether they will levy the rate or not, notwithstanding that the act may contain a clause reserving all ecclesiastical jurisdiction, if it appear, from the rest of the act, that the temporal Court was intended to have at least concurrent jurisdiction. As in the act for St. Margaret's, Leicester (1), which gives powers of laying the rates to an annually chosen select vestry (excluding the ordinary authorities), and of levying them by distress and sale, and also authorises the select vestry to rate other than occupiers, and to compound and make allowances with certain parties rated, and gives an appeal against rates, &c., first to such select vestry, and then to the quarter sessions. (2)

Although a mandamus does not lie to the churchwardens to make a church rate, yet it lies to the churchwardens, &c. of two united parishes, under stat. 10 Anne, c. 11., to assemble a meeting, pursuant to s. 24., for the purpose of agreeing upon and ascertaining the monies and rates to be assessed for the repair of the church of one of those parishes. (3)

If money be borrowed to rebuild a church under stat. 59 Geo. 3. c. 134. s. 40., the Court will issue a mandamus to overseers to levy a rate for its repayment. (4)

The writ will be issued for the repayment of principal and interest of money borrowed on the credit of the parish and church rates. In *Reg. v. Bruncaster (Churchwardens of)* (5) a mandamus was issued to the churchwardens, to raise a rate to pay principal and interest of money borrowed on the credit of parish and church rates, under the Church Building Acts (6); a return was made, stating that, since the security was given, the lender, who was the prosecutor, had become bankrupt; to which it was pleaded, that the prosecutor had lent the money as trustee for a party named, out of monies vested in him as trustee, and in which he had no interest, except as trustee; and on demurrer, assigning for cause, that the nature of the trust did not appear:—The return was held to be good.

Trustees appointed under a local act for building a new parish church, with power to make rates for that purpose, and for discharging debts to be incurred under the act, are liable to account before parochial auditors appointed under the Vestry Act (7), as a board having controul over part of the parochial expenditure; notwithstanding the local act requires such trustees to keep an account of the assessments, receipts, and payments under the act, to be examined and allowed once a year at quarter sessions; and that their accounts shall be open to inspection (on payment of 1s.) by any person liable to the above rates.

A mandamus calling upon such trustees to produce before the auditors "the accounts" (without limit as to time) kept by them under the local act, and requiring the clerk to the trustees to produce the books of account which may concern the above accounts, is bad, as exceeding the authority given by stat. 1 & 2 Gul. 4. c. 60. ss. 34 & 35., although the writ recited a demand

(1) Stat. 2 Gul. 4. c. 10.

(2) *Reg. v. St. Margaret, Leicester (The Select Vestrymen of)*, 8 A. & E. 889.

(3) *Rex v. St. Margaret and St. John, Westminster*, 4 M. & S. 250.

(4) *Rex v. New Windsor (Overseers of)*, 1 Jurist, 592.; vide etiam *Rex v. St.*

Michael's, Pembroke (Churchwardens of), 5 A. & E. 603.

(5) 7 Ibid. 458. Vide *Phillips v. Hapgood*, 1 B. & Ad. 619. *Lloyd v. Wood*, 5 A. & E. 228.

(6) Stat. 58 Geo. 3. c. 45. & stat. 59 Geo. 3. c. 134.

(7) Stat. 1 & 2 Gul. 4. c. 60.

made by the auditors upon the trustees in terms conformable to the act, and a refusal to comply with such demand. (1)

Except it be under the provisions of a statute, the Court of King's Bench will not grant a mandamus to churchwardens to compel them to make a church rate, it being a subject of ecclesiastical jurisdiction. (2)

In *Reg. v. Thomas (Chapelwarden of Haworth)* (3) it appeared, that by custom in a parish, church rates were made by the parishioners of the whole parish in vestry assembled, but were paid in certain customary proportions by the several townships of which the parish was composed; and upon such facts the Court refused a mandamus to compel the officers of a township to raise the proportion, in a township, of an alleged rate which had been made by the churchwardens and minority of the parishioners in vestry, after the majority had refused the rate, with the intention, as was suggested, of having no rate at all, although the vestry meeting was held in obedience to a monition from the Consistory Court, whereby the churchwardens and parishioners were admonished to hold the meeting and lay a rate.

In *Reg. v. Pickles* (4) the churchwardens of a parish church having made a church rate, obtained a rule nisi for a mandamus to the officers of a township within the parish, to make a rate on the inhabitants of that township, for raising a specified portion of such church rate. The affidavits showed a custom, that the township and another should jointly contribute twice that portion, but did not show how much of the amount was contributable by each. The Court discharged the rule with costs, considering the defect substantial, and refusing to mould the rule. The churchwardens having afterwards, without reference to the former proceedings, obtained a second rule on fresh affidavits, showing that the two townships contributed in equal portions, the Court discharged the rule with costs.

A rate to reimburse the churchwardens such sums as they had expended, or might thereafter expend, on the parish church, would be bad on the face of it, as in part retrospective; and therefore the Court would not grant a mandamus to the chapelwardens of a township within the parish, to make such a rate for raising their accustomed proportion of the whole; and their refusal to make such a rate, when demanded, applying as well to the form as to the substance of the demand, the Court would not grant the mandamus to raise the money in the common form of such a rate prospectively, out of which the churchwardens might repay themselves. (5)

In *Rex v. Sillifant* (6) an application was made for a mandamus to a justice to enforce payment of a church rate, under stat. 53 Geo. 3. c. 127. s. 7.: it appeared that the party assessed had objected to the rate as invalid in the Consistorial Court, but that the rate had there been confirmed; and that the party, being afterwards summoned before a petty session, repeated his former objection:—It was held, that the validity of the rate having been questioned in the Ecclesiastical Court, although it did not appear that such question was any longer depending, the jurisdiction of the justices under s. 7. of the act was so far doubtful, that a mandamus could not issue:

WHEREA MANDAMUS WILL, OR WILL NOT, BE ISSUED.

Except it be under the provisions of a statute, a mandamus will not be granted to churchwardens to compel them to make a rate.

When the writ will not be granted to enforce a monition from the Consistory Court.

Where affidavits do not show the exact amount of contribution.

A rate to reimburse the churchwardens such sums as they had expended, or might expend, is bad on its face.

When the writ will be refused to enforce payment of a church rate under stat. 53 Geo. 3. c. 127. s. 7.

(1) *Rex v. St. Pancras Church (Trustees of)*, 6 A. & E. 314.

(2) *Rex v. St. Peter's (Churchwardens of)*, 5 T. R. 364.

(3) 3 Q. B. 589.

(4) *Ibid.* 599.

(5) *Rex v. Haworth (Chapelwarden of)*, 12 East, 556.

(6) 4 A. & E. 354.

WHERE A MANDAMUS WILL, OR WILL NOT, BE ISSUED.

Judgment of Lord Denman in *Reg. v. Sillis*.

Lord Denman stating, "It is not easy to construe the enactments of 53 Geo. 3. c. 127. on this subject. But there is a circumstance upon which the jurisdiction of justices in a case of this kind is said to be founded, and which does not exist here; namely, that the validity of the rate shall not have been questioned in any Ecclesiastical Court. Here, not only has the validity of the rate been questioned in an Ecclesiastical Court, but the same objection which was there raised, was afterwards taken before the justices, and they were required, upon that ground, to treat the rate as illegal. It is therefore very doubtful, at least, whether they had jurisdiction to enforce the rate, and that is sufficient ground for refusing a mandamus. It is also a well-founded objection to this rule, that it is applied for against one justice only, whereas it does not appear that one only refused the order." "I believe we are all satisfied that there is nothing in the objection that the purposes of this rate are retrospective, the rate being correct on the face of it. That point could be raised only in objecting to the accounts." (1)

Select vestry will not be compelled to make a church rate, if the churchwardens refuse to state the necessary amount, or to furnish any estimate of it.

Where an act of parliament authorised and required a select vestry from time to time, as often as occasion required, to make rates for the relief of the poor, and the repair of churches and highways in the parish, it was held, that they were not compellable to make a church rate upon demand, while the churchwardens refused to state the necessary amount, or to furnish any estimate of it, or to give to the vestry any information whereby they might ascertain it (2); Lord Denman observing, "The churchwardens are bound to make some estimate for the guidance of the vestry, or, at least, to give them information as to the amount of the current expenses, and ordinary wants of the parishioners. The churchwardens have the best means of obtaining the proper information on these matters. They have a controul over part of the church, and the general care and custody of the property belonging to the parish. The statute has not altered their duties in this respect."

Where a select vestry colourably adjourn to evade laying the rate.

When a select vestry adjourned from time to time, on pretexts which the churchwardens alleged, upon affidavit, to be, as they believed, colourable, and merely intended to evade laying the rate, requiring details which could not be furnished for want of funds to pay a surveyor, and fixing an adjournment day, after which a mandamus could not have been obtained for some months, the Court held the adjournments colourable, and equivalent to a refusal; it appearing that a previous select vestry had pursued the same course, and the present select vestry not satisfactorily denying the imputed motive. (3)

(1) The rate was regular on the face of it; but appeared (by affidavit) to have been voted by the parishioners in vestry for the purpose of meeting past disbursements. It seems that the rate was not therefore bad, whatever objection might be raised to a re-

trospective application of the money on passing the churchwarden's accounts.

(2) *Reg. v. St. Margaret, Leicester (The Select Vestry of)*, 10 A. & E. 791.

(3) *Reg. v. St. Margaret, Leicester (The Select Vestrymen of)*, 8 *ibid.* 889.

7. WHEN RATES CAN, OR CANNOT, BE ENFORCED IN THE ECCLESIASTICAL COURT, OR UNDER STAT. 53 GEO. 3. C. 127.

WHEN RATES CAN, OR CANNOT, BE ENFORCED IN THE ECCLESIASTICAL COURT; OR UNDER STAT. 53 GEO. C. 127.

Upon an affidavit that a parish church was in need of repair, and that the majority in vestry refused to make a rate, the Court directed a monition to issue against the churchwardens and parishioners to meet in vestry on a particular day, and make a rate for the necessary repair of the church. (1)

Monition to make a rate.

Parishioners refusing to pay their rates, after a demand from the churchwardens, must be sued in the Ecclesiastical Courts, and not elsewhere (2): for the cognisance of rates made for the reparation of churches and churchyards, in consequence of the stat. 13 Edw. 1., belongs to the Spiritual Court. (3)

Parishioners may be sued for non-payment of rates in the Ecclesiastical Court.

Extreme formality of description is not requisite in a suit brought by churchwardens for subtraction of church rate. (4)

Extreme formality of description not requisite in a suit for rates.

It is, though usual, not essential to the validity of a church rate, that it be "confirmed by the ordinary;" and the circumstance of a church rate not being so confirmed, is no obstacle to its being sued upon in the Ecclesiastical Court. (5)

Rate ought to be confirmed by the ordinary.

Causes of church rate may be removed by letters of request from the commissary of the bishop to the Court of Arches. (6)

Causes of church rate may be removed by letters of request.

In questions of subtraction of church rate, the Court having jurisdiction over the subject-matter is bound, unless stopped by a prohibition, to proceed to the trial of a select vestry, by which the rate was made. (7)

When Court bound to proceed to the trial of a select vestry.

Where estimates for the repairs of a church and the lawful and necessary expenses of churchwardens, amounting to 111*l.*, were laid before a vestry, and a rate to that amount was proposed, but a rate of 50*l.* 17*s.* only granted, whereupon two churchwardens exhibited articles against two other churchwardens and ten parishioners, for refusing to make a sufficient rate; a decree rejecting the articles was affirmed with costs. (8)

Articles exhibited by two churchwardens against two other churchwardens and parishioners for refusing to make a rate, rejected.

On the refusal of a monition against district churchwardens to join the parish churchwardens in making a rate, the district churchwardens, though no parties to the suit below, nor to the decree complained of, may, notwithstanding the formal words of the inhibition, be made the only respondents in an appeal; and the refusal of such monition being a case within the third exception of the Statute of Citations, authorises the citing of the parties out of their diocese. (9)

Where district churchwardens may be made the only respondents to an appeal.

An application to remedy the errors and irregularities in the original proceedings in a diocesan court, in a suit to recover a church rate from the executor of a deceased rate-payer, was, on appeal, refused. And it

Irresponsibility of executor.

(1) *Fielding v. Cook*, 2 Curt. 663.

(2) *Degge's P. C.* by Ellis, 203.

(3) *Paget v. Crumpton*, Cro. Eliz. 659.

(4) *James v. Keeling*, 3 Hagg. 485.

(5) *Knight v. Gloyne*, 3 Add. 53.

(6) *Hawes v. Pellatt*, 2 Curt. 473.

(7) *Goodall v. Whitmore*, 2 Hagg. 372.

(8) *Semble*, that the Ecclesiastical Court

cannot decide on the quantum of a rate; and, therefore, that parishioners who do not contumaciously refuse to make a rate, but grant one not manifestly collusive, are not liable to be articulated for refusing a sufficient rate. *Greenwood v. Greaves*, 4 *ibid.* 77.

(9) *Cotterell v. Mace*, 3 *ibid.* 743.

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Plaintiff's allegation must not go beyond the citation.

Where a rate cannot be set aside on the ground of inequality.

Illegal to raise more money than is requisite.

Churchwarden voting against a rate not guilty of an ecclesiastical offence.

Wilfully opposing a rate, an ecclesiastical offence.

Where custom pleaded.

Where land assessed lies in another parish.

Rate on Quakers.

Where monition will not be issued to the party imposing

seems to be very doubtful, whether an executor is liable in any shape whatever for a church rate due from his testator. (1)

The plaintiff's allegation must not go beyond the citation; therefore, where the citation is limited to show cause why a rate should not be set aside by reason of its inequality, the party cannot plead the illegality of such rate in other respects.

And in a debate on the admissibility of a libel in a cause of subtraction of church rate, the Court can take notice of nothing that is not expressly pleaded or referred to in the libel.

The Court has no jurisdiction over an original proceeding by an individual rate-payer, to set aside a rate on the ground of inequality in the assessment. The remedy for the party unequally assessed is to enter a caveat against the confirmation, or to refuse payment of the rate. (2)

If a rate be made only for the repairs of a church, it is illegal to raise more money than is wanted for that purpose. (3)

At a vestry meeting called by notice, signed by the churchwardens, for the purpose of making a church rate for the repair of the church, a resolution was moved and seconded, "That this vestry, considering church rates at all times bad in principle, and particularly unjust in practice, and quite uncalled for at the present time, resolved to adjourn all further consideration of the subject for which it has been called till this day twelve-months," which resolution was carried:—It was held, that one of the churchwardens, in having voted in favour of the resolution, and against the rate proposed (of two-pence in the pound), was not guilty of any ecclesiastical offence, it not being averred, that, in consequence of the refusal of the rate, the church was still out of repair. (4)

The having wilfully and contumaciously obstructed, or refused to make, or join or concur in the making of, a sufficient rate, is an ecclesiastical offence. (5)

If a suit be instituted in the Ecclesiastical Court for a church rate, and a custom be pleaded of a certain sum in lieu of the rate, or of something done in the room of it, and that plea be admitted, the Court can proceed to try that custom in the same manner as a modus; but if the custom be denied, it will be a proper ground for a prohibition; for the trying of the custom is the province of the common law. (6)

So if the party assessed aver that the land for which he is assessed lies in another parish, and not in the parish where it is assessed, he may have a prohibition, and try it at common law. (7)

The church rate charged upon Quakers may be sued for in the Ecclesiastical Court, as in the case of other parishioners; but it is also recoverable before the justices of the peace, in the same manner as their tithes, which is the preferable mode of proceeding.

The Ecclesiastical Court will not, at the prayer of the defendant, issue a monition to the party imposing the rate for the production of parish books, which are not shown to apply immediately to the question in issue; and if

(1) *Williams v. George*, 2 Notes of Cases Ecclesiastical, 85.

(2) *Watney v. Lambert*, 4 Hagg. 84.

(3) *Brettell v. Wilnot*, 2 Lee (Sir G.), 518.

(4) *Cooper v. Wickham*, 2 Curt. 203.

(5) *Steward v. Francis*, 2 Notes of Cases Ecclesiastical, 131.

(6) *Dun v. Coates*, 1 Atk. 289.

(7) *Degge's P. C.* by Ellis, 203.

on the merits, the rate be pronounced for, the Court will condemn the defendant in costs, for they are almost universally so decreed in suits for church rates, where the rate is confirmed. (1)

Whether stat. 53 Geo. 3. c. 127. s. 7., which gives power to justices to enforce the payment of a sum not exceeding 10*l.* due upon a church rate, where neither the validity of the rate nor the liability of the party has been questioned, takes away the jurisdiction of the Ecclesiastical Court in such cases has been doubted. (2)

But assuming that it does, it seems that it is still competent to institute a suit in that court for payment of a sum under 10*l.* due upon a church rate, because, until the defendant has appeared in such a suit, there may be no means of knowing whether the validity or liability is in dispute or not. Therefore, where a *significavit*, as recited in the return to a writ of *habeas corpus*, stated that the prisoner had been pronounced guilty of contumacy, for non-payment of a sum of 2*l.* 5*s.* to certain churchwardens, with their costs of suit, pursuant to a monition duly issued in a certain cause of subtraction of church rate, the proceedings wherein were carried on in pain of the contumacy of the prisoner, who though duly cited with the usual intimation had not appeared, an objection, that the cause was not sufficiently described, for want of an averment that the validity of the rate or the liability of the party was in dispute, was over-ruled. (3)

The object of the controul which the Court of Chancery has over the Ecclesiastical Courts, by means of the writ of *habeas corpus*, is to keep those courts within the jurisdiction which the law has assigned to them, and not to correct any error into which they may fall in the exercise of it. And, therefore, objections taken to a *significavit*, upon the ground that it did not sufficiently show that the defendant had been regularly cited, and upon the further ground that the Ecclesiastical Court was not, according to its own practice, authorised to proceed to judgment, upon the merits, against a party who had never appeared, were over-ruled. And where an objection was raised, that the *significavit* appeared to be in the name of the official principal and not of the archbishop, it was over-ruled.

It likewise seems, that the memorandum upon a writ *de contumace capiendo* need not show, that all the formalities prescribed by the act 5 Eliz. c. 23. have been complied with.

Thus *In re Baines* (4) Lord Chancellor Cottenham observed:—
“When this case was first mentioned to me, I suggested that questions upon *significavit* from the Ecclesiastical Court had usually been made the subject of discussion here upon applications to discharge or quash the writ *de excommunicato*, or *de contumace capiendo*, when the writ not having been returned in the Queen’s Bench, this Court still had jurisdiction over it. The party has preferred, as he had an undoubted right to do, to rest his case upon the return to the *habeas corpus*; and my consideration is necessarily restricted, not to what has actually taken place in the Ecclesiastical Court, of which I know nothing, except from the *significavit* which that Court has sent to me, but to what is stated in that *significavit* to have there taken place.

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the rate for the production of the parish books.

Whether stat. 53 Geo. 3. c. 127. s. 7., which gives power to justices to enforce the payment of a sum not exceeding 10*l.* due upon a church rate, where neither the validity of the rate nor the liability of the party has been questioned, takes away the jurisdiction of the Court has been doubted.

The object of the controul which the Court of Chancery exercises over the Ecclesiastical Courts, is to keep them within their jurisdiction, and not to correct any error into which they may fall in the exercise of it.

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(1) *Goodall v. Whitmore*, 2 Hagg 369.

(2) *See vide post*, 1178.

(3) *In re Baines*, 1 C. & Ph. 31.

(4) *Ibid*.

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ham *In re*
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"It is important to keep in view the great difference between a Court assuming a jurisdiction which does not belong to it, and improperly exercising a jurisdiction with which it is legally invested. Upon this *habeas corpus* my duty is to protect the prisoner against the former, if it shall appear to have occurred. Another and a very different course would be to be pursued, if necessary, for the purpose of correcting the latter.

"The first objection to the *significavit* was, that it did not show that the sum which the prisoner was ordered to pay was a church rate. I think that this is sufficiently stated, both with respect to the terms used, and the form prescribed by the act. The *significavit* states the command to pay 2*l.* 5*s.* rated and assessed upon him, pursuant to a monition duly issued under the seal of the Arches Court, in a certain cause or business of subtraction of church rate. I am not now considering the amount of the church rate, but whether the *significavit* states the 2*l.* 5*s.* to have been rated and assessed for a church rate; and of this being stated with sufficient certainty I have no doubt; nor does it appear how, consistently with the form prescribed in the schedule to the act, it could be more specifically stated; for, by that form, the command is first to be stated, and then the cause in which it was made; but the command was probably merely to pay the sum in question, without repeating that it was for a church rate, that appearing from the proceedings; and if so, the form has been accurately followed.

"Connected with this objection was another, that the amount of the rate appeared to be under 10*l.*, and that the Ecclesiastical Court had, by the 53 Geo. 3. c. 127., been deprived of its jurisdiction in church rates, unless the sum demanded exceeded that sum, or the validity of the rate, or the liability of the party was in dispute. To raise this objection it must be assumed, that the jurisdiction is so taken away. Such the judges of the Court of Queen's Bench stated to be their opinion, in *Ricketts v. Bodeham* (1), but that opinion did not regulate their judgment in that case; and had that opinion been different, the judgment must have been the same. It is not my wish to raise any doubt upon that point. In that case it was decided, that a previous proceeding before magistrates is not necessary to give the Ecclesiastical Court jurisdiction in cases of church rate under 10*l.* if the validity or liability be in question. It would seem, therefore, that it must be competent to institute the suit, for without a suit, in such a case, there may be no means of showing, that the validity or liability is in dispute; and if so, it does not seem very obvious how the suit can be objected to, upon the ground, that the validity or liability is not disputed, before the defendant appears. It was also decided, that in such a case, although the proceedings did not show that the validity or liability was in question, the party sued was not entitled to a prohibition; and it seems to have been the opinion of the judges, that for that purpose, after sentence in the Arches Court, unless want of jurisdiction appeared upon the proceedings, it would not be intended. I cannot, consistently with this doctrine, hold that the *significavit* does not state a suit of which the Ecclesiastical Court has jurisdiction. The cases of *Deybel* (2) and *Nash* (3), have no application: in

(1) 4 A. & E. 433.

(2) 4 B. & A. 243.

(3) *Ibid.* 295.

those cases, there was no jurisdiction, except upon a particular fact, which was not sufficiently stated. In this case, there is a general jurisdiction, and the doubt is as to a particular fact, which if it exists, may take it away.

Another objection, much relied upon, was, that the *significavit* states, that the party prosecuted had never appeared, and that, without appearance, the Court was not authorised to proceed to judgment upon the merits. In considering this objection, it must be assumed, that the Court had jurisdiction over the subject-matter; and if so, the objection, if well founded, would amount only to this, namely, that it has improperly exercised its jurisdiction, and pronounced an illegal judgment. There may be very many grounds upon which a judgment may be illegal, and in one sense, the Court, in pronouncing such judgment, exceeds its jurisdiction; but this is not the sense in which the expression is used, when applied to such a case as the present. The object of the jurisdiction I am now exercising is to keep the Ecclesiastical Courts within the jurisdiction which the law has assigned, and not to correct any error into which they may fall in the exercise of it. If this distinction be not carefully kept in view, every court and judge having authority to issue the *habeas corpus* would become a court of appeal from the court by whose authority the party was committed, and so usurp the jurisdiction which the law has reposed in those courts to which an appeal is given. In *Dr. Treher's case* (1), Lord Hardwicke very clearly marks the distinction, saying, 'It is not necessary for the Ecclesiastical Court to show they have rightly proceeded.' I do not say that a proceeding may not be so inconsistent with all principle as to justify the treating it as a nullity; but that cannot be said of this case, in which the course of proceeding has been one which has been made legal in other courts, and which is essential to the due administration of justice, I mean proceeding to judgment in cases in which the defendant, with full notice of the suit, and of its objects, does not choose to appear.

I was told, during the argument, and with perfect accuracy, that I could not judicially know any thing of the practice of the Ecclesiastical Court, and therefore that I could not know what was meant by the words 'usual intimation;' and yet I was referred to several books of practice in the Ecclesiastical Court, for the purpose of proving that the Court would not be justified in pronouncing any decree *in absentia*; but if that be so, it is not within my province to correct it, in the present proceeding. If I were to commit a party for a contempt of this Court, the Court of Queen's Bench would not, upon an *habeas corpus* inquire into the propriety of my order, but simply whether it appeared upon the return that I had kept within my jurisdiction.

It was then argued, that the term 'usual intimation' was so uncertain, as to make the *significavit* bad, upon the authority of a decision that the term 'usual penance' had been held to be too uncertain. No doubt it would be so if it were essential for the Court to know what the intimation was, as in the case referred to, it must have been thought to be, to know, what had been the penance inflicted; but as part of the narrative of proceedings in a matter over which the Court had jurisdiction, it is not, I think, material to know, what the intimation was, as it would not be competent for

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(1) 2 Atk. 498.

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me to exercise my judgment, whether it was the usual intimation or not; besides which, it is twice stated, that the party was duly cited; which expression is, indeed, as vague as the other, though it was not made the subject of observation. The terms are convertible, because the usual mode of citing was the due mode.

“ Another objection was, that the significavit was in the name of Sir Herbert Jenner, the dean of the Arches, and not in the name of the Archbishop of Canterbury. The act is imperative upon the judge to make the certificate; but it was said that he ought to make it in the name of the archbishop, not from any expression in the act itself, (all such expressions tending to the conclusion that the whole duty of sending the significavit was reposed in the judge,) but because the form in the schedule is adapted to a significavit in the name of the archbishop. If the enacting part and the schedule cannot be made to correspond, the latter must yield to the former, and particularly in this case, in which the form given in the schedule cannot be made to apply to all or nearly all the cases which must arise; for a bishop could not send a significavit in that form. It must, therefore, be taken only as an example or precedent to be altered and adapted to each particular case. But what removed all doubt from my mind upon this subject, was the information I have received from the officer, that the dean of the Arches has always sent the significavits in his own name.

“ One other objection remains, which may be disposed of in very few words. The act of Elizabeth directs, that the writ shall be brought into the Queen’s Bench, and in the presence of the justices shall be opened, and delivered of record, &c.; but the memorandum only states that the writ was allowed, enrolled, delivered, and before our lady the Queen at Westminster, according to the form of the statute in such case made and provided, omitting to state, that it was opened. This memorandum cannot be true if there were any foundation for the fact assumed for the purpose of objection; but certainly nothing appears to have been done contrary to what the act requires; and the rule that ‘omnia presumuntur solenniter esse acta’ therefore applies.

“ I am, for these reasons, of opinion, that none of the objections made to the significavit can be supported, and that the prisoner must be remanded.”

When the va-
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c. 127. s. 7.;
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Stat. 53 Geo. 3. c. 127. s. 7., which gives power to a justice to enforce the payment of a sum under 10*l.* due upon a church rate, takes away the jurisdiction of the Ecclesiastical Court, if the validity of the rate or the liability of the party have not been questioned. But, if the validity or liability be in question, the Ecclesiastical Courts have jurisdiction, though the party has not been summoned before a justice. Therefore, in *Ricketts v. Bodenham* (1), where a party, not having been summoned before a justice, was libelled in the Consistory Court for a sum which, on the face of the proceedings, was less than 10*l.*, due upon a church rate, and sentence was given against him, the Court of Queen’s Bench refused to grant a prohibition, upon the ground, that the validity of the rate was questioned in the proceedings in the Ecclesiastical Courts. And afterwards, it appearing, by more particular reference to the pleadings themselves, that they did not disclose whether or not the validity was questioned, the

(1) 4 A. & E. 433. ; vide etiam *Richards v. Dyke*, 3 Q. B. 256

Court of Queen's Bench held, that that circumstance alone, did not authorise it to issue a prohibition; Lord Denman delivering the judgment of the Court as follows:— "There were three cases of application for a prohibition in the same cause; the first to the Consistory Court of the diocese of Hereford, the second to the Court of Arches, the last to the Court of Delegates, in each of which Courts successively, sentence had passed against the applicant.

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"It appeared that the original suit had been to enforce the payment of a church rate amounting to 4*l.* 6*s.* 3*d.*, and that the defence had been, that the rate was made at a meeting of which no due and legal notice had been given; that it was made for an illegal purpose, and showed upon the face of it an unequal and fraudulent assessment.

"On showing cause against the motion, it was contended, that the only ground of prohibition suggested, was a supposed want of jurisdiction in the Court below to proceed in the matter of a church rate, where the sum to be recovered did not exceed 10*l.*, but that the objection, coming after sentence, was too late, unless it appeared on the face of the proceedings in that Court. And there is no doubt that, in the case of prohibitions to be granted for the sake of trial, as distinguished from those which are to be granted upon account of a wrong trial or erroneous judgment, the rule is established, that a party neglecting to contest the jurisdiction in the first instance, and taking his chance of a favourable decree, shall not be allowed after sentence to allege the want of jurisdiction as a ground of prohibition, unless the defect appears on the face of the pleadings. The justice of the rule is very apparent, and the propriety of the exception scarcely less so; for it is the duty of this Court to restrain any encroachment of jurisdiction in the inferior courts, and therefore it interferes for the sake of the public, and not of the individual, where, the want of jurisdiction appearing on the face of the proceedings, the case might become a precedent, if allowed to stand without impeachment.

"In support of the application, Sir F. Pollock scarcely disputed this general doctrine; but he contended that, inasmuch as, on the face of the libel, the suit appeared to be for a rate under 10*l.*, the want of jurisdiction was from that circumstance alone, and by itself, apparent. It is necessary, therefore, to examine the stat. 53 Geo. 3. c. 127. s. 7., to see whether this argument is maintainable.

"That section commences with a preamble, stating the expediency that church or chapel rates of limited amount, unduly refused or withheld, should in certain cases be more easily and speedily recovered. It then goes on to provide for the case of a refusal or neglect by any one duly rated to a church rate, or chapel rate, the validity of which has not been questioned in any Ecclesiastical Court, to pay the sum in which he is rated; and gives a summary mode of enforcement before two justices, who are empowered to order the payment of what is due and payable in respect of such rate, so as the sum ordered to be paid do not exceed 10*l.* There is then an appeal given to the sessions against such order, with a stay of execution pending the appeal. And this is followed by the material proviso, 'that nothing herein contained shall extend to alter or interfere with the jurisdiction of the Ecclesiastical Courts to hear and determine causes touching the validity of any church rate or chapel rate, or from proceeding to enforce the

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payment of any such rate, if the same shall exceed the sum of 10*l.* from the party proceeded against.' If the section had stopped here, we should have thought it clear, that a distinction was made between suits in which the validity of a rate was questioned, and those in which, the rate being undisputed, the only object was to enforce the payment; that, as to the former, the jurisdiction of the Ecclesiastical Courts was left wholly untouched; in the latter, it was by implication taken away where the sum does not exceed 10*l.* This interpretation makes the enacting part of the section and the proviso, consistent, and both together to form a complete enactment on the subject. But this view of the statute is made more clear by the proviso which immediately follows, that, 'if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon, and the person or persons demanding the same may then proceed to the recovery of their demand, according to due course of law, as heretofore used and accustomed.' This proviso applies only to cases under 10*l.*; and the effect of it is that, even in such cases, the moment it appears that the question is one not merely of enforcing payment, but touching the validity of the rate, the summary jurisdiction is at an end, and that of the Ecclesiastical Court attaches.

"If this interpretation of the section be correct, it is obvious, that the mere fact, that on the face of the proceedings the suit appears to relate to an assessment for a sum not exceeding 10*l.*, cannot prove a want of jurisdiction in the Ecclesiastical Court to entertain the cause. Without entering into the argument at the bar, as to presumptions for or against the proceedings of inferior courts, or whether the doctrine applies to the Ecclesiastical Courts, it is at least undeniable, that this Court ought to examine the whole of the proceedings, in order to collect from them, if it can, whether the suit, admitted to be for less than 10*l.*, was a suit in which the validity of the rate or the liability of the defendant was questioned, or whether it was merely for enforcing the payment; this being the real point on which the question of jurisdiction must depend.

"Now, upon such examination, it is obvious, that the validity of the rate, and nothing else, was in question; it follows, therefore, that there is no want of jurisdiction apparent on the face of the proceedings; and it becomes unnecessary to give any opinion upon other points made in the argument.

"Considering that Mr. Ricketts has proceeded through two stages of appeal without raising the ground of objection which is now made, we cannot regret that all the authorities warrant us in discharging this rule."

If a suit be commenced in the Ecclesiastical Court for non-payment of rates, below the amount of 10*l.*, it is doubtful how far it is necessary, in order to show jurisdiction, that the libel should show the existence of a dispute as to the validity of the rate, or liability of the party; but it seems that, on proceedings in prohibition, this would be deemed a matter of practice determinable only by the Ecclesiastical Court.

Where the declaration in prohibition stated a libel exhibited in the Consistory Court for non-payment of church rate; that the party libelled appeared, and objected to the jurisdiction, and to the libel, and to any

In prohibition,
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a dispute under
stat. 53 Geo. 3.
c. 127. is a
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Where a de-
claration suffi-

proceedings being had thereon, on the ground that the suit was for church rates under 10*l.*, "the validity of which or of any of them had not been disputed or denied by the plaintiff," and did not appear by the libel to have been so, and that the proceeding ought to have been before justices of peace according to the statute; nevertheless, the Court proceeded, &c.; and the plaintiff averred, that in fact no proceeding had been taken or complaint made against him before justices for recovery of such rates, nor had he at any time disputed the validity of such rates or any of them, or his liability to pay, and that the subject-matter of the suit was not of ecclesiastical cognisance, and the rate should have been proceeded for before justices under the statute; it was held, in *Richards v. Dyke* (1), on general demurrer to the declaration, that it sufficiently showed the absence of a dispute within section 7., to oust the Ecclesiastical Court of jurisdiction:—Lord Denman observing, "In this case the question is directly raised, whether the 7th section of stat. 53 Geo. 3. c. 127. has taken away the jurisdiction of the Ecclesiastical Courts to enforce the payment of a church rate, where the sum does not exceed 10*l.*, and where the validity of the rate and the liability of the party are undisputed.

"This Court has already expressed a strong opinion in the affirmative in the case of *Richetts v. Bodenham* (2); but, as the validity of the rate was disputed in that case, the jurisdiction of the Ecclesiastical Court clearly remained, and it became unnecessary to act upon that opinion. So in the subsequent cases of *Regina v. Thorogood* (3) and *Regina v. Barnes* (4), and *In re Baines* (5), it was unnecessary to determine the question now raised. We adhere to the interpretation put upon the statute in the case of *Richetts v. Bodenham* (6), and for the reasons there stated. The two provisos by which the jurisdiction of Ecclesiastical Courts is declared not to be altered or interfered with, whenever the validity of the rate or the liability of the party is disputed, or the sum demanded exceeds 10*l.*, show the intention of the legislature that such jurisdiction should be altered and interfered with where the sole object is to enforce an undisputed rate for a sum not exceeding 10*l.*, that being the only case in which jurisdiction is given to justices of the peace. The proviso was indeed unnecessary so far as regards cases where the sum exceeds 10*l.*, and can only have been inserted *ex majori cautela*: still it shows the intention of the legislature. If, however, the jurisdiction of the Ecclesiastical Courts be altered and interfered with in such cases, it can only be by taking it away.

"The general rule of law and construction undoubtedly is, that, where an act of parliament does not create a duty or offence, but only adds a remedy in respect of a duty or offence which existed before, it is to be construed as cumulative; but this rule must in all cases be applied with due attention to the language of each act of parliament. For instance, the 4th section of the act in question extends the provisos of stat. 7 & 8 Geo. 3. c. 6. s. 1., respecting the recovery of small tithes before justices, from 40*s.* to 10*l.*; and on reference to that act, sect. 8., it will be found that, if any person charged before the justices shall insist upon any

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ciently showed the absence of a dispute within stat. 53 Geo. 3. c. 127. s. 7. to oust the Ecclesiastical Court of jurisdiction.

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(1) 3 Q. B. 236.

(2) 4 A. & E. 442, 443.

(3) 12 *Ibid.* 181.

(4) *Ibid.* 210.

(5) 1 Cr. & Ph. 31.

(6) 4 A. & E. 433.

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prescription, composition, or modus, the justices shall forbear to give any judgment in the matter, and that then and in such case the person complaining shall be at liberty to prosecute in any other court where he might have sued before the making of this act, any thing in this act to the contrary notwithstanding. This section is nearly as strong as sect. 7. of the act now under consideration, except that it does not mention in express terms altering or interfering with the jurisdiction of the Ecclesiastical Courts; yet it is plain, that the legislature did not intend to take away that jurisdiction; for, by sect. 14., it is provided that any person who shall begin any suit for small tithes in the Court of Exchequer, or in any of the Ecclesiastical Courts, shall have no benefit by this act, for the same matter; evidently treating the remedies as concurrent. The omission of any similar clause in the act under consideration, strengthens our opinion, that it was intended to take away the jurisdiction of the Ecclesiastical Courts.

"We are not called upon in this, any more than in the former cases already referred to, to determine whether it be necessary, in order to give jurisdiction to the Ecclesiastical Court, that the fact of a dispute existing respecting the validity of the rate or the liability of the party should appear upon the face of the libel.

"That court has general jurisdiction in matters regarding church rates; and perhaps this is rather a question of practice or pleading in that court. It is sufficient for us to say that it does appear, that the absence of any dispute as to the validity of the rate, or the liability of the party, was shown to the Ecclesiastical Court, and it is averred and not denied, that the Court proceeded notwithstanding. Objections were taken as to the form in which that was shown by the plaintiff in this action; and it was contended, that he might, notwithstanding anything which he has alleged in the Ecclesiastical Court, set up before the justices, that he disputed the validity of the rate, or his liability to pay it. We think that those objections cannot prevail, and that he is concluded by what he has alleged.

"Our judgment will therefore be for the plaintiff."

The Spiritual
Courts have
power to
construe a
statute, the
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comes incident-
ally before
them in the
form of a pro-
ceeding when
they have juris-
diction.

The Spiritual Courts have power to construe a statute, the effect of which comes incidentally before them in the course of a proceeding where they have jurisdiction. Therefore, in *Hull v. Maule* (1), where, on objection taken to a declaration in prohibition, on general demurrer, it appeared that, in a proceeding to enforce a church rate, the Spiritual Court would only have to determine the effect of an act of parliament, the Court of Queen's Bench gave judgment for the defendant in prohibition, on the ground, that the Spiritual Court did not appear to have done anything as yet, and it was not to be presumed that they would construe the statute erroneously.

And, under such circumstances, the Court of Queen's Bench would not give leave to amend, for the purpose of raising the question on the effect of the statute.

In a suit for
subtraction of
a church rate
made by virtue

It was held in *Blunt v. Harwood* (2), that in a suit for subtraction of a church rate made in virtue of stat. 58 Geo. 3. c. 45. & stat. 59 Geo. 3. c. 134., the libel ought to show upon its face, that the conditions required

(1) 7 A. & E. 721.

(2) 1 Curt. 648.

by the acts have been complied with; Sir Herbert Jenner observing, "I am unwilling to throw out anything that might prejudice a particular case, but I must say, with reference to this case, that it lies with the party claiming payment of the rate, to show that the Court can enforce it. The libel states, that the money was borrowed 'under the authority and in pursuance of the acts,' so that it is not a common law right; and before the party can ask the Court to enforce payment of the rate, he must show that the requisites of the acts of parliament have been complied with. What are those requisites? The money is stated to have been borrowed for three objects — the enlargement, repair, and alteration of the church; taking enlargement to include alteration, the 58 Geo. 3. c. 45. s. 59. requires the consent, not only of the vestry, but of the bishop and incumbent to the borrowing, upon the credit of the rates, such sums of money as shall be necessary for defraying the expense of 'enlarging or otherwise extending accommodation.' And it empowers churchwardens 'to make rates for the payment of the interest of such sums of money so to be borrowed and raised, and for providing a fund of not less than the amount of the interest upon the sum advanced, for the repayment of the principal thereof, or for repaying such principal in such manner, and at such times, and in such proportions, as shall be agreed upon with the persons advancing any such money, provided always, that one half of the additional accommodation which shall be obtained by any such expenditure, shall be allotted to unenclosed or free seats.' Is it not incumbent upon the churchwardens to show that they have complied with these conditions? It is quite impossible, unless they put themselves in such a position, that the Court can enforce the rate.

"Again, with respect to repairs. The 58 Geo. 3. contains no provision for borrowing money for repairs; but under the 14th section of the 59 Geo. 3. c. 134., churchwardens are empowered to borrow money upon the credit of the rates, for defraying the expense of repairs, with the consent of the vestry, the bishop, and the incumbent; and they are empowered and required in such cases 'to raise by rate, a sum sufficient, from time to time, to pay the interest of the money so borrowed, and not less than ten per cent. of the principal sum borrowed out of the produce of such rates, until the whole of the money so borrowed shall be repaid.' They are required to raise a fund for the repayment of the principal sum, for this reason, that the repairs of the church lie on the present inhabitants; whereas the expense of enlargement falls likewise on future inhabitants. Unless the churchwardens bring themselves within these provisions they are not able to sue for the rate, and I cannot see how the Court could enforce payment of this demand, unless it be satisfied by legal proof that the money was borrowed in compliance with the conditions of these two sections of the acts of parliament. The churchwardens have the power of proving the affirmative, if it can be proved; whereas the other party is to prove a negative, that the churchwardens had not obtained the consent of the bishop and the incumbent, and that they have not allotted the required number of free seats. How is the party who has not access to the books to prove a negative? and is it not for the churchwardens to show, that they have complied with the acts of parliament?

"I am of opinion that the libel must be reformed."

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of stat. 58 Geo. 3. c. 45. & stat. 59 Geo. 3. c. 134. the libel ought to show upon its face, that the conditions required by the acts have been complied with. Judgment of Sir Herbert Jenner in *Blunt v. Harwood*.

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The libel, as
reformed, with
additional
articles in *Blunt*
v. Harwood.

The libel, as reformed, with additional articles, subsequently came on for admission, pleading

That the population of Streatham having increased, and the church being insufficient to accommodate the parishioners, at a vestry, held on the 17th of March, 1830, in pursuance of notice published on Sunday, the 7th of that month, a committee was appointed to consider a plan then produced to the vestry, and to report whether it would be expedient to adopt that or any other plan for affording additional accommodation to the parishioners desirous of attending divine worship in the said church. That at another vestry, held on the 2d of August, 1830, in pursuance of notice published, &c., on the 25th July, the committee presented their report, recommending an enlargement of the church, agreeable to certain plans submitted by Joseph Parkinson, at an expense not exceeding 3300*l.*; and that it was resolved, that such report should be adopted, and the plans carried into execution, provided proper persons could be found to give security to carry the same into effect, at a sum not exceeding 3300*l.*; that the churchwardens and rector be authorised to carry the plans into execution, and the churchwardens be authorised to borrow the sum of 3300*l.*, at a rate not exceeding 4*l.* per cent. per annum, on the security of the church rates. It went on to plead, that the conditions of the stat. 58 Geo. 3. c. 45. had been complied with, setting forth the particulars, and that the money had been borrowed, &c.

It further pleaded, that the notice published on the 7th March, declared that a meeting was to be held in the vestry room of the said parish on the 17th of that month, at nine o'clock in the morning, for the purpose of considering a plan which would then be produced by the churchwardens of the said parish, for affording additional accommodation to the parishioners desirous of attending divine worship in the said church, or to that effect: and that the notice published on the 25th of July, declared, "that a vestry was to be held in the vestry room of the said parish, on the second day of August then next, at nine o'clock in the forenoon, to receive the report of the committee appointed to consider the plan produced to the vestry meeting, held on the said 17th day of March, for affording additional accommodation to the parishioners desirous of attending divine worship in the said parish church, or to that effect;" and that such notices had been lost, or so mislaid that they could not be found, though diligent searches had been made for them.

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Upon these additional facts Sir Herbert Jenner observed, "The only question now before the Court appears to be this: whether the notice given for the vestry of the 2d of August, 1830, was such as authorised the churchwardens to borrow money on the credit of the church rates, to be applied to the enlargement of the parish church, for the accommodation of the parishioners?"

"It is true that, before the Church Building Acts, there was no power in a vestry of a parish to borrow money on the security of the rates by the common law, and where money was so borrowed, it was done without any legal security. But the Church Building Acts empower churchwardens to raise money in this way, with the consent of the bishop and incumbent, as well as of the vestry; but there must be due notice of the object for which the vestry is held. The Vestry Act (1), requires that no vestry

(1) 53 Geo. 3. c. 69.

shall be held, unless notice shall have been given, three days before, of the place, hour, and special purposes for which the vestry is called; the intention of which was to prevent any surprise on the parish, by doing, under cover of a notice, what was not within the terms of the notice. The question here is, whether what was done at the vestry, on the 2d of August, was not a necessary consequence of the special business for which that vestry was called? The libel pleads, that the population of Streatham having increased, and the church being insufficient, a vestry was held on the 17th of March, when a committee was appointed for the purpose of considering a plan for affording additional accommodation; that another vestry was held on the 2d of August, when the committee presented their report, recommending a certain plan, which was adopted by the vestry, and the money borrowed by the churchwardens. Now, the notice pleaded of this last vestry meeting is this: 'to receive the report of the committee appointed to consider the plan produced to the vestry meeting held on the 17th of March, for affording additional accommodation to the parishioners desirous of attending divine worship in the parish church.' The plan was considered and adopted, and the churchwardens were authorised to borrow money under the act of parliament, to carry it into execution. How much of the business done at this vestry is supposed to come within the meaning of this notice?

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"It appears to me, that, taking the two notices together, the vestry could confirm and adopt the report of the committee, and as a necessary consequence, direct the plan to be carried into execution, and also resolve to borrow money, in order to carry it into execution. I think that the one was the consequence of the other, and that it was not necessary to call another meeting to carry the plan into execution. Undoubtedly the borrowing of money is a very important part of the functions which a vestry is authorised to exercise; but it is one, without the exercise of which, the church could not have been enlarged. It is impossible, that the vestry could have taken any undue advantage of the act, or that any person in the parish could have been misled, or that the money could have been raised in any other way.

"Unless cases can be pointed out in which it has been held that there must be a special notice for borrowing money, I shall consider the notice in this case sufficient to cover the business done at this vestry. It was of no use to appoint a committee to prepare and propose a plan for another vestry, unless the second vestry had the means of carrying the plan into execution; and the second vestry having met for that purpose, and having approved of the plan, resolved that the report of the committee should be confirmed, and that the plan should be carried into execution. It appears to me, that the second vestry did not go further than the first empowered them to do; that they did not exceed the authority they had by directing the churchwardens to borrow money on the security of the church rates. It would be straining the acts of parliament to say, that no money could be borrowed, unless a special notice were given that the money was to be raised.

"If the notice is proved to the extent stated in the libel, I shall be of opinion that the money was fairly borrowed, and that the rate made for

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the payment of the interest, and part of the principal sum, is a legal rate; I therefore admit the libel as reformed."

The question as to the sufficiency of the notice in this case was brought before the Court of Queen's Bench; a rule having been granted by that Court on the 21st of April, 1838, to show cause why prohibition should not issue to the Arches Court, on the ground of the notice being insufficient, under stat. 58 Geo. 3. c. 69. s. 1. The point came on for argument on the 12th of June, 1838, but in the mean time the original notice itself had been found, which was as follows:—

" *Streatham, 24th July, 1830.*

" Notice is hereby given, that a vestry will be held in the vestry room of this parish, on Monday, the 2d day of August, at nine o'clock precisely, to receive a report from the church committee, and to adopt such measures as may appear necessary for carrying that report into execution; and further, that it is intended that such vestry do adjourn to the workhouse of this parish, there to transact the business of the day."

And the Court of Queen's Bench being of opinion, that this was a sufficient notice, discharged the rule nisi for a prohibition, upon the understanding, that the libel should be reformed, by pleading the real notice: but it seems, unless the notice itself had been discovered, that a prohibition would have issued. (1)

Additional articles were afterwards brought in and admitted in the Arches Court, pleading the notice above set forth; upon which the party proceeded against no longer opposed the rate, whereupon the judge pronounced for the rate, but without costs.

To constitute a good assembly of the select vestry appointed, pursuant to stat. 58 Geo. 3. c. 45. and stat. 59 Geo. 3. c. 30., there must be present a majority of the number, viz. fourteen, named in the appointment; and if a rate be made for the repair of the church, at a meeting where a majority is not present, it will be illegal, and its payment cannot be enforced in the Ecclesiastical Court. Thus, in *Blacket v. Blizzard* (2) Mr. Justice Bayley observed, " I take it to be a general rule of law, that where a public trust is to be executed by a definite number of persons, it must be executed at a meeting where a majority of that number is present, unless there be a usage or custom to the contrary. It is different from a trust or power of a private nature, for that must be executed by all the persons to whom it is given. There are several cases which bear upon this subject, and which fully warrant the position which I have stated. In *Cook v. Loreland* (3) the crown, by letters patent, granted to the master and wardens of the corporation of bakers (there being four wardens), by themselves or their deputy or deputies, full power to overlook and correct the trade of baking; and it was held, that the master and one warden could not justify entering the house of a baker to overlook bread; for if they acted as principals, they did not amount to a majority of the persons to whom the power was given, and if they acted as deputies, it should have appeared that they were appointed by the majority. In *Rex v. Beeston* (4), the statute 9 Geo. 1. c. 7. s. 4.

(1) Vide *Blunt v. Harwood*, 8 A. & E. 610.

(2) 9 B. & C. 851.

(3) 2 B. & P. 31.

(4) 3 T. R. 592.

When there must be a majority of the entire number of the select vestry, under stat. 58 Geo. 3. c. 45. and stat. 59 Geo. 3. c. 30., to make a valid church rate.

And see also of Mr. Justice Bayley in *Blacket v. Blizzard* and

ing enabled the churchwardens and overseers, with the consent of the r part of the parishioners, to contract for the providing for the poor, it held not to be necessary that all the churchwardens and overseers ld contract, but it was considered to be clear that the concurrence of jority was essential. In *Withnell (Clerk) v. Gartham (Clerk)* (1) a r granted by deed to appoint a schoolmaster to an ancient foundation, i to the vicar and churchwardens, of whom there were eleven, and in of their neglect in appointing, then to devolve to two corporate bodies ccession; and to result, in the dernier resort, to the same vicar and hwardens, to whom also the general power of managing the trust was nitted, was held to be well executed by the vicar and a majority of the hwardens. It seems to have been considered, that an appointment by than the majority would be bad. Mr. Justice Lawrence says, 'In al it would be the understanding of a plain man, that where a body of as is to do an act, a majority of that body would bind the rest.' It is ly established, that where in a corporation there is a definite body, a rity of that definite body must not only exist at the time when any act be done, but a majority of that body must attend the assembly where an act is to be done. (2) In *Reg. v. Ipswich (Bailiffs of)* (3) f Justice Holt lays it down, that unless a commission of the peace nates a quorum, all the justices appointed by it must attend at a ms. In *Grindley v. Barker* (4) the point decided was, that if a r of a public nature be committed to several, who all meet for the oe of executing it, the act of the majority will bind the minority. it is impossible to read that case without seeing, that the judges of opinion there must be a majority of the body present. No has been cited to show, that any number less than a majority of a ite body is capable of doing any act which that body is authorised to Here the select vestrymen were called upon to do an act requiring nent and discretion, and calculated to affect the property of others. as it be essential to constitute a good select vestry, that there should be jority in number of those constituting the body, it would be impossible edicate what number would be necessary. In the case of an ancient t vestry, the number might possibly be ascertained by custom or ; but even that custom or usage must be presumed to have been led on some quorum clause contained in the instrument by which the : vestry derived its authority from the parishioners. But in the case odern select vestry, where the number cannot be ascertained by usage stom, the public would have no security that there should at all times number of vestrymen sufficient to discharge the duties committed to estry, unless the rule of law, which requires that a public trust com- d to a definite number of persons should be executed at a meeting, e the majority of that number is present, prevails. If the legislature ht, that a greater number than the majority of those constituting the ymen should in any particular case attend, they might have so provided press terms, as they have in one instance, by stat. 58 Geo. 3. c. 45. s. 60.

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3 T. R. 388.

Rex v. Baldringer, 4 *ibid.* 810. *Rex v.*

6 *ibid.* 268. *Rex v. Bower*, 1 B. & C. 492.

(3) 2 Ld. Raym. 1232.

(4) 1 B. & P. 229.

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What is a good
demand of the
rate.

Justices under
stat. 53 Geo. 3.
c. 127. & stat. 54
Geo. 3. c. 68. (1.)
can issue war-
rants of distress
for the non-pay-
ment of church
rates.

Justices can
act upon the
complaint of
one church-
warden.

Undue election
of church-
wardens will
not invalidate
a church rate.

Proceedings in
the Ecclesiasti-
cal Court will
not prevent
subsequent pro-
ceedings under
stat. 53 Geo. 3.
c. 127.

Appeal to
sessions.

Ecclesiastical
jurisdiction
saved.

But I think, that in all cases where the legislature has not expressly so provided, the general rule of law ought to prevail. That being so, the rate which was imposed at a meeting of the select vestry, where there was not such a majority present, is bad. The judgment of the Court must, therefore, be for the plaintiff. I have mentioned the point to Lord Tenterden, and he concurs in the judgment."

Where the churchwardens required the select vestry to lay a rate, or to do another act, which last was illegal, it was held, nevertheless, to be a good demand of the rate. (1)

By stat. 53 Geo. 3. c. 127. s. 7. (2) for England, and stat 54 Geo. 3. c. 68. s. 7. (3) for Ireland, when any person rated to a church or chapel rate (the validity of which has not been questioned in any Ecclesiastical Court), refuses payment, any justice of the county, city, &c., on complaint of any churchwarden or churchwardens, may convene, by warrant, such person before two or more justices, and to examine on oath into the merits of the complaint, and may direct, under their hands and seals, payment of any sum so due, not exceeding 10*l.* besides costs, to be recovered, if payment be not made, by distress and sale of the goods of the offender, under the warrant of any one of such justices.

In *Reg. v. Fenton* (4) it was held, that the justices may act upon the complaint of one churchwarden, though in a parish having ten; Mr. Justice Patteson observing, "In the cases where it was held, that a majority of overseers should act, the statute used only the plural number. Here the words are 'churchwarden or churchwardens.' The rule must be absolute." (5)

Where parties are unduly elected churchwardens, but are admitted and sworn in, and act, they may convene a vestry for laying a church rate; and a rate laid at such a vestry is valid.

They may also complain of non-payment, under stat. 53 Geo. 3. c. 127. s. 7., so as to give justices of peace jurisdiction, the sum not exceeding 10*l.* (6)

If proceedings against a ratepayer be commenced in the Ecclesiastical Court to enforce a rate, and afterwards abandoned, the same person may afterwards be summoned before justices, under stat. 53 Geo. 3. c. 127. s. 7., and be by them ordered to pay the rate. (7)

By stat. 53 Geo. 3. c. 127. s. 7., an appeal is allowed to the next quarter sessions for the county, &c., wherein the church, &c., for which the rate was made, is situate; and if the justices present, or a majority, affirm the judgment, it can be decreed by order of sessions, with costs to be levied by distress and sale of the appellant's goods: but when such an appeal is made, no distress warrant can be granted for the rate till after its determination.

But nothing contained in stat. 53 Geo. 3. c. 127. is to alter the jurisdiction of the Ecclesiastical Courts to hear and determine causes, touching

(1) *Reg. v. St. Margaret, Leicester* (Select Vestrymen of), 8 A. & E. 889

(2) *Vide* Stephens' Ecclesiastical Statutes, 1051.

(3) *Ibid.* 1070.

(4) 1 Q. B. 480.

(5) *Vide Morrell v. Martin*, 6 Bing. N. C. 373.

(6) *Reg. v. St. Clement's, Ipswich* (Inhabitants of), 12 A. & E. 177.

(7) *Ibid.*

validity of any such church or chapel rate, or from enforcing payment of it, if it exceed 10*l.*, from the party proceeded against. If the validity of the rate, or liability of the person from whom it is demanded, be disputed, and the party give notice thereof to the justices, they are to enforce judgment thereon, and the persons demanding the same may sue to recovery of their demand by due course of law as before. But nothing therein contained is to affect parliamentary enactments respecting church or chapel rates of any particular parishes or districts.

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When as it appears that the validity of the rate is disputed, and that the jurisdiction is not merely one for enforcing payment, the summary jurisdiction of the magistrates is at an end, and the ecclesiastical jurisdiction is (1)

Notice that the validity of the rate is disputed supersedes the authority of the justices.

By stat. 53 Geo. 3. c. 127. s. 7. a party summoned before two justices, for non-payment of a church rate, may give them notice that he disputes the validity of the rate, or his liability to pay the same, although no process is commenced in the Ecclesiastical Court; and where a party so summoned told the justices that he would bring an action against any person who ventured to levy the rate, as he thought he had no right to pay the same, as he had no claim to, or seat in, the chapel:—It was held to be a sufficient notice, that he disputed his liability to be rated, and therefore the action was quashed. (2)

In *Wale v. Pollard* (3) it appeared, that at a meeting of vestry held in obedience to a monition from the Ecclesiastical Court, it was moved and seconded that a church rate be laid upon the parish for the necessary repairs of the church. It was then proposed and seconded, that there be no rate for the parish church for the current year. The original resolution was rejected by a majority. A proposition was then made and seconded, that a voluntary subscription be commenced to pay the costs of the repairs, and which was adopted by a majority. The churchwardens thereupon proceeded to levy a rate with the consent of the minority, against which there was a protest. Upon a complaint before justices against the churchwardens for the non-payment of the sum to which he was liable in respect of the rate, he gave notice, first, that he protested against the churchwardens generally; secondly, that he should not contest the validity of the rate in the Ecclesiastical Courts; and, thirdly, that he should commence an action in the courts of common law, against the justices, for all acts connected with the rate which he should be advised were illegal:—It was held, that the validity of the rate was sufficiently disputed, and notice thereof given to the justices within the proviso, stat. 53 Geo. 3. c. 127. s. 7.

His statement to the justices, by the party complained of, that he disputed the rate, and that he has entered a caveat in the Ecclesiastical Court against its being allowed, does not deprive the justices of jurisdiction; they must still hear and examine, to ascertain whether the rate is *bonâ fide* disputed. (4)

Justices to ascertain whether the rate is *bonâ fide* disputed.

Wicketts v. Bodcnham, 4 A. & E. 433., 7. Stephens' Ecclesiastical Statutes, 54. *Rex v. Sillifant*, 4 A. & E. 1170.

(2) *Rex v. Milnrow (Chapelwardens of)*, 5 M. & S. 248.

(3) 11 Jurist, 539.; *et vide* S. C. Addenda.

(4) *Rex v. Wrottesley (Clerk)*, 1 B. & Ad. 648.

WHEN RATES CAN, OR CANNOT, BE ENFORCED IN THE ECCLESIASTICAL COURT, ETC.

Party appealing against an order of justices under stat. 53 Geo. 3. c. 127. may give notice of appeal to the churchwardens exclusively.

Preliminaries to issuing warrant.

Exceeding authority of warrant.

Stat. 54 Geo. 3. c. 170. s. 12. Distress made out of district.

Costs.

Stat. 3 & 4 Vict. c. 93. When ecclesiastical judge can discharge party in contempt.

Under the words "costs lawfully incurred by reason of the

In *Rex v. Staffordshire (Justices of)* (1) it was held, that a party appealing against an order of justices for payment of a church rate under stat. 53 Geo. 3. c. 127. s. 7., need not give notice of appeal to the justices making the order; it is sufficient to give it to the churchwardens. And if such notice to the justices were necessary, service of it upon one of the justices would suffice; Lord Denman observing, "The appellant has entitled himself to the writ. The sessions have no right to introduce a new condition of appeal, which is not in the act of parliament. And, if notice to the justices were necessary, service on one would be sufficient. It has been so held under other statutes which require the giving of notice to justices."

Under stat. 53 Geo. 3. c. 127. s. 7., the justice cannot issue his warrant, unless it be made affirmatively to appear before him that the amount does not exceed 10/., and that no question is made respecting the rate in the Ecclesiastical Court.

Where a constable, having a warrant of distress under stat. 53 Geo. 3. c. 127. s. 7., broke the outer door of, and entered, plaintiff's dwelling house, it was held that, although he acted illegally, yet, as it was not shown that he acted with any other intention than that of executing the authority delegated to him by the warrant, no action could be maintained after the expiration of three calendar months (the limitation in the statute, sect. 12) from the fact committed. (2)

By stat. 54 Geo. 3. c. 170. s. 12., the goods and chattels of any person neglecting to pay any sum legally assessed on him in respect of any rate for the relief of the poor, church, cess, or highway cess of any district, parish, &c., for seven days, after demand made, may be distrained, not only within the parish, district, &c., in which it is made, but also within any other district, parish, &c., within the same county or jurisdiction; and if sufficient distress cannot be found within such county, &c., then, on oath thereof made before any justice of the peace of any other county, &c., in which any of the goods of such person shall be found, which oath such justice must certify by indorsing his name on the warrant granted to make such distress, and the goods, &c., will be liable to such distress and sale in such other county, &c., and may, under such warrant and certificate, be distrained and sold as if found within the district, parish, &c. in or for which the rate was due.

Costs, though in the discretion of the Court, are, in its legal discretion, guided by former precedents, and are almost universally decreed in suits for church rates, when the rate is pronounced to be subtracted. (3)

By stat. 3 & 4 Vict. c. 93., in cases of subtraction of church rates for an amount not exceeding 5/., the ecclesiastical judge may discharge the party in contempt, without the consent of the other parties to the suit, where he has suffered imprisonment for six months, on payment of the sum for which he may have been cited with costs. (4)

Under the words, "costs lawfully incurred by reason of the custody and contempt of such party," in stat. 3 & 4 Vict. c. 93., costs in the Ecclesiastical Court only are intended. Thus, in *Baker v. Thorogood* (5) Dr. Lushington observed, "I am now, for the first time, to carry into effect a new

(1) 4 A. & E. 842.

(2) *Theobald v. Crichmore*, 1 B. & A. 227.

(3) *Goodall v. Whitmore*, 2 Hagg. 363.

(4) *Baker v. Thorogood*, 2 Curt. 652.

(5) *Ibid.*

act — totally different from any other — passed with a view of authorising the release of a person in custody ; and in consequence it becomes the duty of the Court to be guided by the true meaning of the act.

“ In order to ascertain the true construction of the statute, I think it necessary, in the first instance, to consider the state of the law prior to the passing of it, and then to see how far the law has been altered by the statute.

“ The person committed in this case for contempt was sued in the Ecclesiastical Court for a church rate, a subject over which the Court had undoubted jurisdiction. He refused to appear, or to submit to the judgment of the Court ; he was consequently pronounced in contempt, his contempt was signified, and he has been for a considerable time past in custody. If no such statute had passed, the course of proceeding would have been this : the Court would have been called upon, at the instance of the party imprisoned for contempt, to allow his contempt to be purged, and that could only be done on the payment of the costs incurred in this Court in consequence of his contempt, and on his taking the usual oath to submit to the lawful commands of his ordinary. Now, let us see whether, under these extraordinary circumstances, the Court would have required any thing more to be done on the part of Mr. Thorogood. Suppose application had been made, either for a writ of habeas corpus, or for the purpose of quashing the writ de contumace capiendo, to a court of common law, and that Court had been of opinion, that the Consistorial Court of London had properly exercised its jurisdiction, and it had refused the application ; unquestionably, the other party must have incurred certain costs. Now, whatever those costs may have been, it is perfectly clear that, previous to the statute, I could have taken no cognisance of them at all ; because the proceedings would have been before another jurisdiction, which was alone competent to decide whether a party was liable to the costs, and to cause the costs to be paid. I now consider the provisions of the present statute, and to what extent it has altered the antecedent law.

“ I have observed that, prior to the passing of this statute, it was requisite for a party to submit himself to the jurisdiction of the Court, and to take an oath of obedience. I apprehend that, unless under very peculiar circumstances, it would not have been competent to this Court to allow a party to purge his contempt without taking the oath of obedience. This is a question which I have endeavoured to investigate to the utmost of my ability, and I do not find it has ever been done, unless under very peculiar circumstances. This having been the state of the law, what change has been made by the present act ? It empowers the Judicial Committee of the Privy Council, or the judge of an Ecclesiastical Court, if it shall seem meet to the said committee or judge, to make an order for the discharge of a party out of custody ; so that the act confers a discretionary power, which the Court, under ordinary circumstances, had no right to exercise. It then provides, that no such order shall be made without the consent of the other party ; that is, that the Court can dispense with the oath of obedience if the other party consent. The next proviso, which is applicable to the present case, is, ‘ that, in cases of subtraction of church rate, for an amount not exceeding five pounds, where the party in contempt has suffered imprisonment for six months and upwards, the consent of the other party to the suit shall

WHEN RATES CAN, OR CANNOT, BE ENFORCED IN THE ECCLESIASTICAL COURT, ETC.

custody and contempt of such party” in stat. 3 & 4 Vict. c. 93, costs in the Ecclesiastical Court only are intended.

Judgment of Dr. Lushington in *Baker v. Thorogood*.

WHEN RATES
TAX, OR CAN-
NOT, BE EN-
FORCED IN THE
ECCLESIASTI-
CAL COURT, ETC.

Judgment of
Dr. Lush-
ington in *Baker*
v. Thorogood.

not be necessary to enable the judge to discharge such party, as soon as the costs lawfully incurred by reason of the custody and contempt of the party shall have been discharged, and the sum for which he may have been cited into the Ecclesiastical Court shall have been paid into the registry of the said Court.' The effect of this proviso is to give the Court a power, where these circumstances concur, namely, in a church rate case where the amount does not exceed five pounds, and the party in contempt has been imprisoned for six months, to discharge the contumacious person without the consent of the other party; but it requires that the costs lawfully incurred by reason of such custody and contempt shall be previously paid. The question, then, is narrowed to this, whether the costs taxed by the registrar are the costs intended by the statute; or whether I am bound to take into my consideration the costs alleged to have been incurred in the proceedings adverted to by the queen's advocate?

"I think it is obvious that 'costs lawfully incurred by reason of the custody and contempt' must mean, primarily at least, costs incurred in this Court; because it is over such costs alone that this Court had jurisdiction before the passing of the act; and it is with respect to these costs alone that this Court has the means of ascertaining their due and proper amount. It would be singular if this Court had conferred upon it the extraordinary power of ascertaining, and not only of ascertaining, but of deciding upon, a party's liability to the costs in another court. I do not know, in this case, whether the Court of Queen's Bench has condemned the party in the costs, or what is the amount of the costs, if it has so condemned him, and I do not possess the means of ascertaining either question. Again, it would be singular, if this Court should be invested with the power of keeping a person in prison till the costs in another court were paid, that other court being invested with power infinitely superior, and able to exercise it, for enforcing the payment of any costs it may condemn a party in. Therefore, it does appear to me, that, unless the words of the statute were so extremely strong as to leave the Court in no doubt as to their meaning, I should act most in accordance with the ancient practice of these courts, if I were to confine their meaning to the costs incurred in this Court. I do not think, indeed, that it is consistent with the object and intention of the legislature that these words should include the costs of an opposition to an application for a writ of habeas corpus, or for a rule to quash a writ de contumace capiendo.

"Then the single question is, what I ought to do in this case with reference to the discretionary power conferred upon me by this statute? The amount of the rate sued for is 9s. 2d. It is admitted that the party, not only refusing to pay but setting the authority of the Court at defiance, has been in prison for a period twice the length of time mentioned in the act. In exercising the discretion conferred upon me by the statute, I must act according to its true meaning and intention, without reference to any opinion which may be entertained as to the propriety or impropriety of the conduct of the party in any part of the case. I think it is clear, from a perusal of the act, that, under ordinary circumstances, considering that the amount of rate sued for in this case is considerably under 5l., and that the party has been imprisoned for much longer than six months, the Court (unless under very peculiar circumstances) is bound by the words of the

act, and will, in this case, exercise a just discretion in directing the party to be released from confinement.

“ The course I shall adopt is this : on the amount of the costs, as taxed by the registrar, being paid into Court, and also the charge incurred for the warrant, and also the amount of the rate sued for, as stated in the libel, to direct John Thorogood to be released from prison without further order.”

In *Chesterton v. Farlar* (1), although a party had successfully resisted payment of a church rate, he was not dismissed, with his full costs, because he had put matters in plea which caused unnecessary expense.

Where a church rate was made to raise 400*l.*, a part of which, amounting to 250*l.*, was intended to pay debts incurred in the previous year by reason of the parishioners having refused a rate, it was pronounced against with costs. (2) ;

WHEN RATES CAN, OR CANNOT, BE ENFORCED IN THE ECCLESIASTICAL COURT, ETC.

Full costs will not be given, if party cause unnecessary expense.

Retrospective church rate pronounced against with costs.

READING IN. (3)

Stat. 13 & 14 Car. 2. c. 4. s. 6.—Incumbent to read within two months after actual possession the morning and evening prayers, and to declare his assent thereto — *Stat. 13 Eliz. c. 12.* — New incumbent to subscribe to the articles touching his confession of faith, and to declare his assent thereunto within two months after induction — *Explanatory notes respecting the provisions of stat. 13 Eliz. c. 12. & stat. 13 & 14 Car. 2. c. 4.*—In legal matters a month means a lunar month — Incumbent within three months after institution, or collation, to read the declaration of uniformity and the certificate of having subscribed it before the bishop—FORM OF CERTIFICATE OF READING IN—OATHS OF ALLEGIANCE, SUPREMACY, AND ABJURATION.

By stat. 13 & 14 Car. 2. c. 4. s. 6. (4) every parson presented or collated or put into any ecclesiastical benefice or promotion, must in the church, chapel, or place of public worship belonging to his benefice or promotion, within two months next after being in the *actual possession* thereof, upon some Lord's day, openly, publicly, and solemnly read the morning and evening prayers, appointed to be read by and according to the Book of Common Prayer, at the times thereby appointed ; and after such reading, openly and publicly, before the congregation there assembled, declare his unfeigned assent and consent to the use of all things therein contained and prescribed in these words : “ I., A. B., do hereby declare my unfeigned assent and consent to all and every thing contained and prescribed in and by the book intituled the Book of Common Prayer and Administration of the Sacraments, and other Rites and Ceremonies of the Church, according to the use of the Church of England ; together with the Psalter or Psalms of David, pointed as they are to be sung or said in churches ; and the form or manner of making, ordaining, and consecrating of Bishops, Priests, and Deacons.”

Stat. 13 & 14 Car. 2. c. 4. s. 6. Incumbent to read within two months after actual possession the morning and evening prayers, and to declare his assent thereto.

(1) 2 Curt. 77.

(2) *Ellis v. Griffin*, *ibid.* 673.

(3) *Fide* tit. ARTICLES.—EXAMINATION

AND REFUSAL — INSTITUTION — LAPSE — ORDINATION — PRESENTATION.

(4) *Vide* Stephens' Ecclesiastical Statutes, 519.

READING IN.

And if (without some lawful impediment to be allowed and approved by the ordinary of the place) he neglect or refuse to do so (or in the case of impediment within one month after such impediment has been removed), he will *ipso facto* be deprived of all his ecclesiastical benefices and promotions.

Stat. 13 Eliz.
c. 12.
New incumbent to subscribe to the articles touching his confession of faith.

By stat. 13 Eliz. c. 12. ss. 3. & 8. (1) every person admitted to any benefice with cure (2) must publicly read the articles of religion therein contained (3), agreed upon in convocation in the year 1562, in the parish church of that benefice, with the declaration of his unfeigned assent to the same; and every person admitted to a benefice with cure, except that within two months after his induction (4) he do publicly read the articles in the same church whereof he have cure (5), in the time of common prayer there (6), with the declaration of his unfeigned assent thereunto (7), will be upon every such default (8) *ipso facto* immediately deprived (9); provided that no title to confer or present by lapse accrue upon any deprivation *ipso facto*, until after six months notice of such deprivation has been given by the ordinary to the patron. (10)

(1) *Vide* Stephens' Ecclesiastical Statutes, 428—432.

(2) *Admitted to any benefice with cure*:—This is meant of such benefices as have parochial churches belonging to them, and extends not to dignities in cathedral and collegiate churches. And therefore, where the case related to reading the articles, and it was not alleged in the declaration that the benefice was a benefice with cure, it was held to be ill. *Reg. v. Lincoln (Bishop of)*, 1 Anders. 62.

(3) *The articles of religion therein contained*:—The words in the foregoing part of stat. 13 Eliz. c. 12. are only the articles of religion which concern the confession of the true Christian faith and the doctrine of the sacraments, comprised in a book, entitled "Articles, whereupon it was agreed by the archbishops and bishops of both provinces, and the whole clergy, in the convocation holden at London in the year 1562," and as there may be some doubt whether this clause in s. 3., referring to the said articles, means all the thirty-nine articles so agreed upon in convocation, or only those of them which concern the confession of the true faith and doctrine of the sacraments, it has been thought advisable to read the whole number, with a declaration of assent to the same. Williams on the Clergy, 57. *Vide* Stephens' Ecclesiastical Statutes, 430. *in not.*

(4) *Except that within two months after his induction*. Computing twenty-eight days to the month; for in *Brown v. Spence* (1 Lev. 101.), where the induction was September 15., and the articles were read November 15., this was judged insufficient. *Baker v. Brent*, Cro. Eliz. 679.; *sed vide* stat. 23 Geo. 2. c. 28.

The foregoing case of *Brown v. Spence* scarcely appears sufficient to prove the point for which it was cited in *Baker v. Brent*; for

the reading of the articles in that case could not be said to be within the two months, even if the months were reckoned according to the calendar; for where the computation is to be made from or after an act done, the day of doing the act is to be included. *Res v. Adelerley*, 1 Doug. 464. *Jones v. Morley*, 1 Ld. Raym. 287.

(5) *In the same church whereof he have cure*:—*Ante*, 60.

(6) *Time of common prayer there*:—*Ibid.*

(7) *Declaration of his unfeigned assent thereunto*:—*Ibid.* 60, 61.

(8) *Every such default*:—*Ibid.* 61.

(9) *Immediately deprived*:—So as the church is presently void, without any declaratory sentence; for avoidance by act of parliament needs not any sentence declaratory; and if it did, the statute would be defrauded at the ordinary's pleasure, if he would not deprive. *Green's case*, 6 Co. 89. (b). And this is the received interpretation of the statute, although the contrary seems to be supposed in *Bacon v. Carlisle (Bishop of)* (Dyer, 346.), (which was but six years after making of the act), as it is reported by Dyer; inasmuch, as the notice given by the bishop is there declared insufficient, for this among other reasons, because he did not notify, that he had deprived the clerk by such sentence. 4 Inst. 324.

(10) *But after six months after notice of such deprivation given by the ordinary to the patron*:—In *Bacon v. Carlisle (Bishop of)* (Dyer, 346.), a question arose concerning the manner of giving notice. The Bishop of Carlisle had signified in an instrument under seal, that Bacon had not subscribed to the articles, according to the statute; which instrument, the jury found, was publicly read in the church by the curate of the place, and afterwards affixed by the apparitor to the parsonage house. But this notice was declared insufficient, not only

By stat. 23 Geo. 2. c. 28. the minister may, in cases of sickness or other lawful impediment, read the articles and declare his assent to the same, at the time of reading morning and evening prayers, after the expiration of two months.

In *Hart v. Middleton* (1) Chief Baron Pollock said, "In legal matters 'a month' means a lunar month, but in commercial matters, a 'month' always means a calendar month. In bills of exchange, promissory notes, invoices, times of credit, and everything else relating to commercial matters, it is so; and I know of no instance to the contrary."

By stat. 13 & 14 Car. 2. c. 4. s. 11. (2), after making the subscription therein required (3), every parson, vicar, curate, and lecturer must procure a certificate under the hand and seal of the respective archbishop, bishop, or ordinary of the diocese (who are enjoined and required, upon demand, to make and deliver the same), and publicly and openly read the same, together with the declaration (4) or acknowledgment, upon some Lord's day within three months then next following, in his parish church where he is to officiate, in the presence of the congregation there assembled, in the time of divine service, upon pain that every person failing therein shall lose his parsonage, vicarage, or benefice, curate's place, or lecturer's place respectively, and be utterly disabled, and *ipso facto* deprived of the same.

In order that the clerk may be enabled to prove that he has complied with the requisitions of the foregoing statutes, he should have the churchwardens or some friends to be present as witnesses, during his "reading in," and he should desire them to read with him, or to observe as he reads the morning and evening prayers, and also the thirty-nine articles; and he ought also to give them a copy of his certificate, under the hand and seal of the bishop, and of the declarations which he is to read (5); and a printed form of a certificate for such purposes is usually supplied by the bishop's secretary at the time of institution or collation. (6)

READING IN.

Stat. 23 Geo. 2. c. 28.

In legal matters a month means a lunar month.

Stat. 13 & 14 Car. 2. c. 4. s. 11.

Incumbent within three months after institution or collation to read the declaration of uniformity, and the certificate of having subscribed it before the bishop.

because no mention was made therein, either of the patron, or of the deprivation by declaratory sentence; but chiefly, because the notice ought to have been given to the patron immediately. And accordingly, Lord Coke lays down (*Green's case*, 6 Co. 29.), two qualifications of the notice mentioned in this act.—1. It ought to be given by a person certain, that is, the ordinary; for if any other, of his own head, give notice to the patron, it is not material. 2. The notice ought to be certain and particular, and therefore it is not sufficient for the ordinary, in such case, to give notice, that the presentee had not read the articles and subscribed, generally, but he ought, particularly, to inform the patron, that he had not read the articles; for which default he is deprived, and that, thereupon, it belongs to the patron to present. Gibson's Codex, 818. *Vide Powell v. Milbank*, 2 Black. (Sir W.), 851.

(1) 2 C. & K. 9.

(2) Stephens' Ecclesiastical Statutes, 573. 628.

(3) *Vide ante*, tit. INSTITUTION.

(4) Together with the declaration:—A

doubt has been raised, whether the design of the act was, that the clerk should only read the bishop's certificate to the congregation, in testimony of his having subscribed the declaration before him, or whether, after having read the certificate, he should not also make the same declaration again in form, before the congregation; which point has never been judicially determined; but the latter opinion is not only more safe, but has also been thought more agreeable to the tenor of the act, than the bare reading of the certificate. Gibson's Codex, 817.

(5) Williams on the Clergy, 61.

(6) The following form (*vide* Hodgson's Instructions to the Clergy, 36.) is the usual certificate of reading in:—

Memorandum—That on Sunday the— day of—, in the year of our Lord one thousand eight hundred and—, A. B., rector [or vicar] of the rectory [or vicarage] of the parish church of—, in the county of—, and diocese of—, did read, in his parish church of— aforesaid, the articles of religion, commonly called the Thirty-nine Articles, agreed upon in convocation in the year of our Lord 1562, and did declare his

READING IN.

oaths of allegi-
ance, supre-
macy, and ab-
juration.

Within six months after institution or collation the new incumbent or canon is to take the oaths of allegiance, supremacy, and abjuration (1) in one of the courts of Westminster, or at the general quarter sessions of the county, city, or place where he resides, on pain of being incapacitated to hold the benefice, and of being disabled to sue in any action, or to be guardian, or executor, or administrator, or capable of any legacy or deed of gift, or to bear any office, or to vote at any election for members of parliament, and of forfeiting 100*l*.

REGISTER, OR REGISTRAR.

Canon 123. — No act to be sped but in open court — Stat. 52 Geo. 3. c. 146. s. 8. — Registrars to make reports to bishops whether copies of the register books have been sent in — Stat. 1 & 2 Vict. c. 106. s. 116. — Stat. 3 & 4 Vict. c. 113. — Penalty for neglect of registration — Fee to registrar — Where a mandamus will lie for a deputy registrar — Judgment of Lord Tenterden in REX v. GLOUCESTER (BISHOP OF) — Canon 134. — Abuses to be reformed in registrars — Whether a bishop can withdraw his appointment of a registrar without proceedings at common law.

Canon 123.
No act to be
sped but in
open court.

By canon 123. "no chancellor, commissary, archdeacon, official, or any other person using ecclesiastical jurisdiction, whosoever shall speed any judicial act, either of contentious or voluntary jurisdiction, except he have (2) the ordinary registrar of that court, or his lawful deputy; or if

unfeigned assent and consent thereto; also that he did publicly and openly, on the day and year aforesaid, in the time of divine service, read a declaration in the following words, viz. "I, A. B., do declare, that I will conform to the liturgy of the united Church of England and Ireland, as it is now by law established," together with a certificate under the hand of the right reverend —, by divine permission Lord Bishop of —, of his having made and subscribed the same before him; and also, that the said A. B. did read in his parish church aforesaid, publicly and solemnly, the morning and evening prayer, according to the form prescribed in and by the book intituled "The Book of Common Prayer, and Administration of the Sacraments, and other Rites and Ceremonies of the Church according to the use of the united Church of England and Ireland; together with the Psalter or Psalms of David, printed as they are to be sung or said in Churches, and the Form or Manner of making, ordaining, and consecrating of Bishops, Priests, and Deacons." And that, immediately after reading the evening service, the said A. B. did openly and publicly, before the congregation there assembled, declare his unfeigned assent and consent to all things therein contained and prescribed in these words, viz. "I, A. B., do declare my unfeigned assent and consent to all and every thing con-

tained and prescribed in and by the book intituled 'The Book of Common Prayer, and Administration of the Sacraments, and other Rites and Ceremonies of the Church, according to the use of the united Church of England and Ireland; together with the Psalter or Psalms of David, printed as they are to be sung or said in Churches, and the Form or Manner of making, ordaining, and consecrating of Bishops, Priests, and Deacons.' And these things we promise to testify upon our corporal oaths, if at any time we should be duly called thereto.

In witness whereof we have hereunto set our hands, the day and year first above written.

C. D. G. H.
E. F. I. K.

(1) *Fide* stat. 1 Eliz. c. 1., stat. 1 Gal. 3. c. 8., stat. 1 Geo. 1. st. ii. c. 13., stat. 1 Geo. 1. st. ii. c. 55., stat. 10 Geo. 1. c. 4., stat. 9 Geo. 2. c. 26., stat. 16 Geo. 2. c. 20., stat. 6 Geo. 3. c. 53., and stat. 31 Geo. 3. c. 32.

(2) *Except he have* : — This is according to the rule of the ancient canon law : — *Quoniam contra falsam assertionem iniqui iudicis, innocens litigator quandoque non potest veram negationem probare, cum negantis factum, per rerum naturam, nulla sit directa probatio; ne falsitas veritati præjudicet, aut iniquitas prævalcat acquitati; ita*

he or they will not or cannot be present, then such persons as by law are allowed in that behalf to write or speed the same, under pain of suspension *ipso facto*."

By stat. 52 Geo. 3. c. 145. s. 8. (1) the registrar of every diocese in England shall, on or before the 1st of July, 1814, and on or before the 1st of July in every subsequent year, make a report to the bishop of the diocese, whether the copies of the registers of the baptisms, marriages, and burials, in the several parishes and places within such diocese have been sent to the registrar, in the manner and within the time therein required; and in the event of any failure of the transmission of the copies of the registers as therein required, by the churchwardens and chapelwardens of any parish or chapelry in England, the registrar is to state the default of the parish or chapelry specially in his report to the bishop.

By stat. 1 & 2 Vict. c. 106. s. 116., if the registrar of any diocese refuse or neglect to make any entry, or to do any other matter or thing prescribed by the act, he will forfeit for every such refusal or neglect the sum of 5*l*.

Stat. 3 & 4 Vict. c. 113. s. 86. enacts, that the orders in council carrying into effect the recommendations of the ecclesiastical commissioners shall be gazetted; and by sect. 88. the registrar of every diocese to whom any order of the queen in council shall be delivered is forthwith to register the same in the registry of his diocese; and if he refuse or neglect to register any such order, he will for every day during which he shall so offend forfeit 20*l*.; and if his offence continue for the space of three months, he will forfeit his office, and the bishop of the diocese can appoint a successor thereto.

By sect. 89. the registrar for the registration under the act is not to be entitled to receive any fee or reward, but on every search for any such order he is to receive a fee of three shillings, and for every copy or extract of any such order, certified by him, he is entitled to receive fourpence for every folio of ninety words; and the copy of every such entry, certified by the registrar, is to be admissible as evidence in all courts and places whatsoever.

In *Rex v. Ward* (2) a mandamus has issued to Dr. Ward, the commissary, to admit Henry Dryden to be deputy register of the Archbishop of York's Court: exception was taken to the writ, because a mandamus would not lie for a deputy; and *White's case* (3) was cited, where Chief Justice Holt says, that for a deputy a mandamus would not lie. But it was answered, that this was not a mandamus for the deputy, but for the

REGISTER, OR
REGISTRAR.

Stat. 52 Geo. 3.
c. 146. s. 8.
Registrars to
make reports
to bishops,
whether copies
of the register
books have
been sent in.

Stat. 1 & 2
Vict. c. 106.
s. 116.

Stat. 3 & 4
Vict. c. 113.
ss. 86. & 89.
Penalty for
neglect of re-
gistration.

Stat. 3 & 4
Vict. c. 113.
s. 89.
Fee to re-
gistrar.

Where a man-
damus will lie
for a deputy
registrar.

tuimus. ut tam in ordinario judicio quàm in extraordinario, judex semper adhibeat aut publicam (si potest habere) personam, aut duos viros idoneos, qui fideliter universa judicii acta conscribant, videlicet, citationes, citationes, recusationes, exceptiones, petitiones, responsiones, et interrogationes, confessiones, testium depositiones, instrumentorum productiones, interlocutiones, appellationes, conclusiones, et cætera quæ occurrerint, competenti ordine conscribenda; loca designando, tempora, et personas. Et omnia sic conscripta partibus tribuantur, ita quòd originalia penes scriptores remaneant; ut si super processu judicis fuerit suborta

contentio, per hoc possit veritas declarari: quatenus hoc adhibito moderamine, sic honestis, et discretis deferatur judicibus, quòd per improvidos, et iniquos, innocentium justitia non lædatur. Judex autem, qui constitutionem ipsam neglexerit observare, si propter ejus negligentiam quid difficultatis emergerit, per superiorem judicem debita animadversione castigetur: nec pro ipsius præsumatur processu, nisi quatenus in causâ legitimis constiterit documentis. Extra. l. 2. t. 19. c. 11. de Prob.

(1) *Ide ante*, 129, 130.

(2) 2 Str. 893. *ante*, 652.

(3) 6 Mod. 18.

principal to be admitted to have a deputy: that the refusal of Dryden was to the damage of Dr. Sharpe, and therefore to do him right in the premises the writ was awarded. It likewise appeared that Dr. Sharpe had a freehold in the office; so, though his deputy was but at will, he had it for life. That in *Rex v. Clapham* (1), a mandamus was granted to restore a person to the office of deputy steward of the court of the council of the Marches, and it was held to lie for a revocable deputy, because the principal had no other way to get him admitted; and in the report of the same case, in 1 Lev. 306., it was said by the Court, that although a mandamus did not lie for a deputy, yet it did for him who deputed him, to have him admitted or restored, for otherwise he might be deprived of his power to make a deputy. It was further objected, that a mandamus did not lie for a spiritual office; and for this were cited divers cases, where it was determined that a mandamus will not lie for a proctor, who belonged as much to the Ecclesiastical Court as the register did: to which it was answered, that this was not any objection; that a mandamus had been granted to admit an under-schoolmaster, and yet schoolmasters were within the canons of 1603, as well as registers; and in the case of *Folks* it was issued for the office of apparitor-general of the Archbishop of Canterbury; that it had been often granted for a parish clerk; for a sexton; so in like manner it had been granted to restore Dr. Bentley to his degrees; and to admit Dr. Sherlock to a prebend at Norwich: and it was to be observed, that no assize could be maintained for this office; therefore, if the party had not this remedy, he had none: the reason why it was refused to a proctor was, because it did not appear what interest he had, but here appeared a freehold. *Per Cur.*: We all think this writ is good, notwithstanding the exceptions that have been taken, and therefore a peremptory mandamus must go.

In *Rex v. Gloucester (Bishop of)* (2) the registrars of a diocese were authorised by their patent of office (under the bishop's hand and seal) to appoint a deputy "to be approved of and allowed by the bishop," who, if he should not approve of and allow the deputy named and proposed to him, was empowered to nominate another with a salary payable out of the profits of the registrarship. The registrars appointed a deputy, subject to the approbation and consent of the bishop, who declared that "for good and sufficient reasons" he disapproved of the party nominated, but declined specifying his reasons. In this case the Court refused a rule nisi for a mandamus to the bishop to admit the deputy; Lord Tenterden observing, "The authority given to the registrars by this patent is, to exercise the office by themselves or one of them, or by a sufficient deputy or deputies 'to be appointed by them, and to be approved of and allowed by the bishop.' In this case he disapproves of the appointment, and he distinctly states that he has good and sufficient reasons for so doing. It is true, he says, he has made no charge, reflection, or insinuation against any person's character: but he may have reasons sufficient to determine his judgment, without feeling called upon to throw out imputations. He has, by law, the power of approving or disapproving, and we cannot call upon him to exercise it in one particular way or another."

judgment of
Lord Tenter-
den in *Rex v.*
Gloucester
(Bishop of).

(1) 1 Vent. 110.

(2) 2 B. & Ad. 158.

By canon 134. "if any registrar, or his deputy or substitute whatsoever, shall receive any certificate without the knowledge and consent of the judge of the court; or willingly omit to cause any person (cited to appear upon any court day) to be called; or unduly put off and defer the examination of witnesses to be examined by a day set and assigned by the judge; or do not obey and observe the judicial and lawful monition of the said judge; or omit to write, or cause to be written, such citations and decrees as are to be put in execution and set forth before the next court day; or shall not cause all testaments exhibited into his office to be registered within a convenient time; or shall set down or enact, as decreed by the judge, any thing false or conceited by himself, and not so ordered or decreed by the judge; or in the transmission of processes to the judge ad quem, shall add or insert any falsehood or untruth, or omit any thing therein, either by cunning or by gross negligence; or in any causes of instance, or promoted of office, shall receive any reward in favour of either party, or be of counsel directly or indirectly with either the parties in suit; or in the execution of their office shall do aught else maliciously, or fraudulently, whereby the said ecclesiastical judge or his proceedings, may be slandered or defamed; we will and ordain that the said registrar, or his deputy or substitute, offending in all or any of the premises, shall by the bishop of the diocese be suspended from the exercise of his office for the space of one, two, or three months, or more, according to the quality of his offence; and that the said bishop shall assign some other public notary to execute and discharge all things appertaining to his office, during the time of his said suspension."

REGISTER, OR
REGISTRAR.

Canon 134.
Abuses to be
reformed in
registrars.

In the case of the *Bishop of Bangor* (1), who was prosecuted at the Shrewsbury assizes in 1796, by the deputy registrar of the Consistorial Court, for a riot and assault in forcibly taking possession of his room in the chapter house, Mr. Justice Heath intimated a doubt whether the bishop had the power of withdrawing a confirmation of this officer's appointment, and his strong opinion that at all events he must have recourse to a proceeding at common law. The jury, however, acquitted the defendant.

Whether
bishop can
withdraw his
appointment of
a registrar
without pro-
ceedings at
common law.

REGISTER BOOK. (2)

A parish register is a book in which all the christenings, marriages, and burials of the parish are recorded.

Regulations respecting register books were made by stat. 6 & 7 Gul. 3. c. 6., stat. 9 & 10 Gul. 3. c. 35. s. 4., and stat. 26 Geo. 3. c. 33. They were, however, repealed by stat. 52 Geo. 3. c. 146. (3) But stat. 6 & 7 Gul. 3. c. 86. (4) s. 1. repealed that statute as far as it related to the registration

Enactments
respecting
register
books.

(1) 3 Burn's E. L. 458.

—49., stat. 7 Gul. 4. & 1 Vict. cc. 22. & 24.,
& stat. 3 & 4 Vict. c. 92.

(2) Vide Canon 70. and stat. 4 Geo. 4.
c. 76. s. 6., ante, 291.

(4) Vide Stephens' Ecclesiastical Sta-
tutes, 1736.

(3) Vide stat. 11 Geo. 4. & 1 Gul. 4. c. 66.
s. 20—22., stat. 6 & 7 Gul. 4. c. 36. ss. 1

REGISTER
BOOK.

Register book
belongs to the
parish.

Canon 70.
Ministers to
keep a register
of christenings,
weddings, and
burials.

of marriages (1), but the registration of baptisms (2) and burials (3) were not affected.

The register book belongs to the parish (4), and the incumbent alone is not entrusted with the keeping of it, much less the curate.

By canon 70. "in every parish church and chapel within this realm shall be provided one parchment book, at the charge of the parish, wherein shall be written the day and year of every christening, wedding, and burial which have been in that parish since the time that the law was first made in that behalf, so far as the ancient books thereof can be procured, but especially since the reign of the late queen. And for the safe keeping of the said book, the churchwardens, at the charge of the parish, shall provide one sure coffer, with three locks and keys; whereof the one to remain with the minister, and the other two with the churchwardens severally; so that neither the minister without the two churchwardens, nor the churchwardens without the minister, shall at any time take that book out of the said coffer. And henceforth, upon every sabbath-day, immediately after morning or evening prayer, the minister and churchwardens shall take the said parchment book out of the said coffer, and the minister, in the presence of the churchwardens, shall write and record in the said book the names of all persons christened, together with the names and surnames of their parents, and also the names of all persons married and buried in that parish in the week before, and the day and year of every such christening, marriage, and burial; and that done, they shall lay up that book in the coffer, as before, and the minister and churchwardens unto every page of that book, when it shall be filled with such inscriptions, shall subscribe their names. And the churchwardens shall, once every year, within one month after the five-and-twentieth day of March, transmit unto the bishop of the diocese, or his chancellor, a true copy of the names of all persons christened, married, or buried in their parish in the year before, ended the said five-and-twentieth day of March, and the certain days and months in which every such christening, marriage, and burial was had, to be subscribed with the hands of the said minister and churchwardens, to the end the same may faithfully be preserved in the registry of the said bishop, which certificate shall be received without fee. And if the minister or churchwardens shall be negligent in performance of any thing herein contained, it shall be lawful for the bishop or his chancellor to convent them, and proceed against every of them as contemners of this our constitution."

(1) *Id. ante*, 750—758.

(2) *Ibid.*, 129, 202.

(3) *Ibid.*

(4) When parish registers are admitted as evidence, *vide* Stephens on *Nisi Prius* 1591, tit. EVIDENCE.

REQUEST (LETTERS OF). (1)

Stat. 23 Hen. 8. c. 9. — Obligation of the Court of Arches to receive letters of request — Judgment of Sir George Lee in BUTLER v. DOLBEN — Causes which may be brought in the diocesan court of the province — Letters of request ordinarily lie to the Court where the appeal lies — Arches Court has an original jurisdiction in suits for subtraction of legacy — Letters of request transmissible to Scotland — Authority of bishop under the Church Discipline Act — Causes of church rate — Letters of request offered by two ecclesiastical judges conjointly — Letters of request from bishop's commissary, to what court to be directed — Where proceedings have been instituted by proxy — Rejection of letters of request for want of jurisdiction — Commissary of Buckingham — Judge of the Arches would probably refuse letters of request from the Consistory of London, or the Court of the Dean and Chapter of St. Paul's — Court of Arches no authority to cite originally except in the cases specified in stat. 23 Hen. 8. c. 9. — Judgment of Sir George Lee in HUGHES v. HERBERT — IN PROCEEDING ON LETTERS OF REQUEST, IT IS SUFFICIENT TO EXHIBIT THEM ON MOTION, IT NOT BEING NECESSARY TO PLEAD THEM.

By stat. 23 Hen. 8. c. 9. no person is to be cited to appear in any court of the diocese or peculiar jurisdiction in which the person cited or summoned be inhabiting or dwelling at the time of the awarding or giving of the citation or summons, unless any bishop, or other inferior judge, receive request or instance to the archbishop or bishop, or other superior, ordinary, or judge, to determine the matter before him or his substitutes, that only to be done in cases where the law, civil or canon, affirms the citation of such request or instance of jurisdiction to be lawful.

Stat. 23 Hen. 8. c. 9. devolves upon the dean of the Arches the power of accepting letters of request in matrimonial suits, without the consent of the party proceeded against; and the dean of the Arches is bound *ex debito officii* to receive them. (2)

Thus in *Butler v. Dolben* (3) Sir George Lee writes, "I was of opinion, that the jurisdiction of the Court of Arches was now entirely settled by stat. 23 Hen. 8. c. 9., that the Arches is by that statute empowered to take original cognisance, by virtue of letters of request, of such causes as the law and canon law allowed the inferior judge to devolve to the superior, which are those that are called arduous causes, of which matrimonial were always esteemed the chief; that the statute vested the power of devolving on the judge, without mentioning consent either of the bishop or parties; in fact, the bishop's consent was never required, and that if the parties' consent had ever been deemed necessary, there hardly could be a cause commenced here by request, for the defendant almost constantly desires as many opportunities of appealing as possible for delay. As to the discretion of this Court, whether it shall accept or refuse letters of request when presented by a proper judge, the delegates held in the case of *Pelling (Dr.)*

Stat. 23 Hen. 8. c. 9.

Obligation of the Court of Arches to receive letters of request.

Judgment of Sir George Lee in *Butler v. Dolben*.

(1) *Vide* stat. 23 Hen. 8. c. 9. Stephens' Ecclesiastical Statutes, 130—136. and the cases therein; *et ante*, tit. BRAWLING AND SUEING — PROCESS.

(2) *Jones v. Jones*, Hob. 185. *Jones v. Boyer*, 2 Brownl. 27.

(3) 2 Lec (Sir G.), 312.

REQUEST
(LETTERS OF).

Judgment of
Sir George Lee
in *Buller v.*
Dulben.

v. Whiston (1), that the dean of the Arches was bound to receive them *ex debito justitiæ*; but that it was in the discretion of the inferior judge, whether he would grant them. In this case the party appeared under a protestation against the citation; first, because the request was irregularly made jointly by two judges; and secondly, because the father had no interest to commence the suit. The first point only had been argued; it was clear she must be subject, either to the jurisdiction where she last had a domicile, or to that where she was locally present; for to say she must follow the forum of her husband was begging the question, when the point in issue was, whether she had a husband or not; whichever of the two judges had not the jurisdiction, his act in joining in the request was merely void, for he could not devolve a jurisdiction which he had not; and in this case I thought she was subject to the jurisdiction of the chancellor of London, notwithstanding she was locally present in that diocese by *durance*; for the statute says, that no person shall be cited out of the diocese or peculiar jurisdiction, where the person cited shall be inhabiting and dwelling at the time of awarding or going forth of the citation or summons, and therefore, she being inhabiting and dwelling in the Fleet at the time the letters of request were granted, and the citation issued, might have been cited by the chancellor of London; and I thought, that notwithstanding the *durance*, she was citable where she was inhabiting pursuant to the statute, and great would be the mischief, if a person by being in custody was privileged against being cited to do justice; persons often continued in prison for debt for many years, and had no other habitation. I therefore pronounced for the jurisdiction of the Arches Court, by virtue of the joint letters of request."

Causes which
may be brought
in the diocesan
court of the
province.

It has been said that the Arches Court may take original cognisance by letters of request, of all causes which may be brought in the diocesan court of the province. The nature of these remains to be explained. In any case where a diocesan court within the province has a jurisdiction over the parties, the plaintiff may apply to the judge of such court for letters of request, in order that the cause may be instituted in the Court of Arches; and when the judge of the court below has consented to sign such letters, and they have been accepted by the judge of the Arches, a decree issues under his seal, calling upon the defendant to answer to the plaintiff in the suit instituted against him. (2)

Letters of
request ordi-
narily lie to
the court
where the
appeal lies.

Mr. Rogers states (3) that letters of request ordinarily lie where the appeal lies; the judge who signs them by so doing waiving or remitting his own court, which is all he can do, and the jurisdiction which at once attaches, is that of the appellate court. So that the inferior ordinary must make request or instance of jurisdiction to that judge, into whose court the cause might have been appealed to in the first instance, had he himself proceeded in it.

Arches Court

The Arches Court has original jurisdiction (4) in suits for subtraction

(1) 1 Com. 199. Gibson's Codex, 1007.

(2) 3 Burn's E. L. by Phillimore, 224.

(3) Eccles. Law, 790.

(4) Original jurisdiction:— The Arches

Court has no jurisdiction to determine the allowance to be made for the maintenance and education of minors. *Fleet v. Hulme*. 2 Lee (Sir G.), 140.

of legacy, where the will is proved in the Prerogative Court of Canterbury. (1)

In *King v. Gordon* (2), at the instance of the promoter of the suit, who was creditor, letters of request were decreed to the commissaries for probates, &c. in Scotland, to cite the next of kin who resided in Scotland, to appear and accept administration, or show cause, &c. The commissaries accepted the letters of request, cited the parties personally, and returned a regular and proper certificate of the service, but the next of kin not appearing, administration was decreed to the creditor.

Stat 3 & 4 Vict. c. 86. empowers the bishop in all cases to send the cause by letters of request to the superior court, and if he be patron of the preferment of the accused clergyman, he is compelled to do so; but there does not seem to be in such statute any provision for a case where the archbishop is himself both patron of the preferment and ordinary of the party accused. (3)

Causes of church rate may be removed by letters of request from the commissary of the bishop to the Court of Arches. (4)

Letters of request offered by two ecclesiastical judges conjointly, are not invalid on that account (5); and joint letters of request from the chancellor of London, and the commissary of Buckinghamshire, have been accepted *quatenus*. (6)

"Letters of request" from a bishop's "commissary" go in the same course with the "appeal;" that is, not to the "diocesan," but to the metropolitan court, the Court of Arches. (7)

In a suit of divorce (8), by reason of adultery, instituted by the husband against the wife, and which came, by letters of request, from the Episcopal Consistorial Court of Bath and Wells; it appeared that the proxy, which the husband (who was on service in India) had executed, was for the commencement of proceedings in the Consistorial Court of the Bishop of Exeter (in which diocese Mrs. Hawkes was residing at the time instructions for the proxy were transmitted from this country); these facts were mentioned to the Court, in order to take its opinion on the validity of the proceedings, when it was stated by the proctor for Major Hawkes, that, at the period of their commencement, Mrs. Hawkes was living within the jurisdiction from whence the letters of request issued.

To which the Court observed: "Under the circumstances, and on an affidavit that the residence of the wife was changed before this suit was instituted, the Court will hold the proxy sufficient. It may, however, be advisable for the proctor of the husband to send out to India for a fresh authority, which may arrive before I am called upon to sign the sentence; but if it should not, I shall hold that the proxy, which has been exhibited, is valid."

REQUEST
(LETTERS OF).

has an original jurisdiction in suits for subtraction of legacy.

Letters of request transmissible to Scotland.

Authority of bishop under the Church Discipline Act.

Causes of church rate.

Letters of request offered by two ecclesiastical judges conjointly.

Letters of request from bishop's commissary to what court to be directed.

Where proceedings have been instituted by proxy.

(1) *Vide* Ecclesiastical Commissioners' Report, Feb. 15. 1832, p. 11.

(2) 2 Lee (Sir G.), 139.

(3) Stephens' Ecclesiastical Statutes, 599.

(4) *Hawes v. Pellatt*, 2 Curt. 473. Stephens' Ecclesiastical Statutes, 133. *in not.*

(5) *Butler v. Dolben*, 2 Lee (Sir G.), 312.

(6) *Ibid.* 265. Maddy's Eccles. Dig. 183.

(7) *Burgoyne v. Free*, 2 Add. 405.

(8) *Hawkes v. Hawkes*, 1 Hagg. 191.

REQUEST
(LETTERS OF).

Rejection of
letters of re-
quest for want
of jurisdiction.

Commissary of
Buckingham.

Judge of the
Arches would
probably refuse
letters of re-
quest from the
Consistory of
London, or the
Court of the
Dean and
Chapter of St.
Paul's.

Court of
Arches no au-
thority to cite
originally ex-
cept in the
cases specified
in stat. 23 Hen.
8. c. 9.

Judgment of
Sir George Lee
in *Hughes v.*
Herbert.

Letters of request from the rector of Lincoln College, in the University of Oxford, were rejected, there being no sufficient proof that he was entitled to exercise jurisdiction in the parish of Long Coombe within the diocese of Oxford. (1)

Letters of request from the commissary of Buckingham, go to the Court of Arches and not to the chancellor of Lincoln. (2)

The judge of the Arches would probably refuse to accept letters of request from the Consistory of London, or the Court of the Dean and Chapter of St. Paul's or of Westminster, as the reasons therein alleged, viz. "the better assistance they can there have of advocates and proctors," would be inapplicable. (3)

In *Hughes v. Herbert* (4) it appeared, that on the 20th June, 1745 William Herbert brought a suit in the Consistory of St. David's against Margaret Williams, then Hughes, for restitution of conjugal rights; the suit depended there till the 27th of May, 1746, when sentence was given, that they were husband and wife, and she was decreed to cohabit with him; but she had since married one Hughes. On the 7th of February, 1756, she cited William Herbert into the Court of Arches, to show cause why all the proceedings in the suit at St. David's should not be declared void, because during that suit she was a minor, and was not cited to appear by a guardian, and did not appear by one. It was insisted, that the Court had not jurisdiction, and that the parties had appeared under protest. It was also objected, that this was an original cause of complaint, and not an appeal, and therefore, by stat. 23 Hen. 8. c. 9., the Court was restrained from citing Herbert out of his diocese, unless in some of the five cases excepted in such statute; but that this case did not fall under any of those exceptions.

Upon these facts Sir George Lee writes, "I was clearly of opinion that this was not an appeal, and if it was, it was void, because not interposed within fifteen days after the sentence; that I had no authority to cite originally, except in the cases specified in stat. 23 Hen. 8. c. 9., of which this is not one; that the case of *Doughty and Newell* (5) was in point, and in all the cases I knew of, where querelas had been brought in this court, the jurisdiction was first founded by an appeal brought in due time; and I believed there was not one case to the contrary, for whatever the canon law may say concerning bringing of querelas before the superior judge, this Court is now restrained by the statute of Hen. 8. I therefore pronounced that Herbert was improperly cited, and dismissed him, and said that Hughes might bring a querela in the Court of St. David's, and if it was rejected there, she might appeal therefrom to this court as a grievance; and so it was held in *Collins v. Addison*. (6)

"I cited the following cases, in every one of which the jurisdiction of the Arches was first founded by appeals, and then querelas nullitatis were brought. June 26. 1724, *Falmer and Jackman v. Hicks and Lydstone*; Arches, 1726, *Lomax v. Lomax*; Mich. By-day, 1726, *Warren v. Culm*; Delegates, December 9. 1734, *Rushworth v. Mason and others*; Easter Term, May 15. 1739, *Hawkins and Sumon v. May*; Arches, 4 Sess.

(1) *Pose v. Lee*, 3 Phil. 566.

(2) *Taylor v. Morley*, 1 Curt. 481.

(3) 2 Burn's E. L. by Phillimore, 224.
in not.

(4) 2 Lee (Sir G.), 287.

(5) Arches, 4 Sess. Hilary, 1713.

(6) Arches, June, 1719.

713, *Doughty v. Newell*, in which case this point was expressly
ad.”

REQUEST
(LETTERS OF).

proceeding on letters of request, it is sufficient to exhibit them on
t not being necessary to plead them (1): thus, in *Bolton v.*
), which was a proceeding in prohibition, for that the dean of
s had cited a party out of the diocese of Worcester. On the day
ing cause against the rule nisi for a prohibition, the plaintiff, in the
owed letters of request from the Bishop of Worcester: it was
that such matter ought not to come on upon motion, but ought to
d, because the statute provides, that they shall only be admitted
e civil and canon law doth allow; and therefore it was a matter
be argued, that the Court may be informed by civilians, whether
llows it or not; but both the Courts of King's Bench and Ex-
ield, that it was enough for the party to exhibit his letters of
a motion without putting him to plead.

In proceeding
on letters of
request, it is
sufficient to
exhibit them on
motion, it not
being necessary
to plead them.

RESIDENCE. (3)

ALLY, pp. 1206, 1207.

de of stat. 1 & 2 Vict. c. 105. — *Vicar's oath relating to residence abolished — Two
ices not to be held together, unless within ten miles of each other — Houses purchased
governors of Queen Anne's Bounty to be deemed residences — Vicar or perpetual
e may reside in rectory house — Computation of time.*

ES FOR NON-RESIDENCE, pp. 1207—1209.

persons exempt from penalties for non-residence — *Privileges for temporary non-
ence — Performance of cathedral duties, &c. may be accounted as residence under
in restrictions — Exemptions and partial exemptions from the penalties of non-
ence — Stat. 57 Geo. 3. c. 99. ss. 11. & 13. — Incumbent not liable to penalty for
residence while a tenant occupies adversely.*

RE FOR NON-RESIDENCE, pp. 1209—1221.

es for non-residence on incumbent if he had not a licence or exemption, unless he be
ent on another benefice — *Judgment of Sir Herbert Jenner Fust in BLUCK v.
KHAM upon the construction of stat. 1 & 2 Vict. c. 106. s. 32. — Whether the
lence and Pluralities Act has been partly repealed by the Church Discipline Act —
ment of Dr. Lushington in BLUCK (CLERK) v. RACKHAM — Licence to reside
of the usual house, if unfit — Every petition for licence for non-residence to be
riting, and to state certain particulars — Bishop may grant licences for non-
ence in certain enumerated cases — Appeal to archbishop in case of refusal —
ases not enumerated bishops may grant licences to reside out of limits of bene-
subject to allowance by archbishop — By whom licences may be granted while
is vacant — Duration of licences — Fee for licence — Licences not to be void by the
or removal of the grantor — Licences may be revoked — Copies of licences or re-
tions to be filed in the registry of the diocese, and a list kept for inspection, and
s transmitted to churchwardens, and publicly read at the first visitation — List of
es allowed by the archbishop, or granted in his own diocese, to be annually trans-*

r's Eccles. Law, 789.
v. 225.

(3) *Vide tit. DILAPIDATIONS — SEQUESTRATION.*

mitted to the queen in council, who may revoke licences, &c.—Licence, although revoked to be deemed valid between the grant and the revocation—Incumbents to answer questions transmitted to them by the bishop—Annual return to be made to the queen in council, of residents and non-residents, &c.

4. PENALTIES FOR, AND EFFECT OF, NON-RESIDENCE, pp. 1221—1225.

Residence may be enforced by monition, or the living sequestered—Appeal against sequestration to the archbishop—Incumbent returning to residence on monition to pay the costs—Incumbent returning to residence on monition, but again absconding himself within twelve months, the bishop can, without further monition, sequester—Reasons for remitting penalties for non-residence of a certain amount to be transmitted to the queen in council—Benefice continuing so sequestered one year, or being twice so sequestered within two years, to become void—Recovery of penalties against spiritual persons—Recovery of fees, &c.—Recovery of penalties against laymen or unbeficed clergymen—Application of penalties—Penalties not recoverable for more than one year.

GENERALLY.

1. GENERALLY. (1)

The law (2) respecting clerical residence, with the exception of a few trivial exemptions, under stat. 57 Geo. 3. c. 99. (3), is embodied in stat. 1 & 2 Vict. c. 106.; and the previous statutes upon the subject have been repealed.

Principle of
stat. 1 & 2 Vict.
c. 106.

The principle of stat. 1 & 2 Vict. c. 106. is, that beneficed clergymen shall reside upon their benefices, or if they have two benefices, they must reside upon one of such benefices.

Vicar's oath
relating to re-
sidence abo-
lished.

It was requisite by the canonical law, to take an oath of residence, but by stat. 1 & 2 Vict. c. 106. s. 61. no oath shall be required of, or taken by, any vicar in relation to residence on his vicarage. (4)

(1) *Vide* Stephens' Ecclesiastical Statutes, 1836—1885. Stat. 13 Eliz. c. 20. Stat. 2 & 3 Vict. c. 49. Stat. 4 & 5 Vict. c. 39. ss. 9, 10, 23, & 24. Stat. 3 & 4 Vict. c. 60. s. 21. Stat. 3 & 4 Vict. c. 86. s. 2. Stat. 3 & 4 Vict. c. 113. s. 34.

The principal decisions in the common law courts relative to residence, previously to the enactment of stat. 1 & 2 Vict. c. 106. are, *Still v. Coleridge*, Forrest, 117. *Vaux v. Vollans (Clerk)*, 4 B. & Ad. 525. *Balls q. t. v. Atwood (Clerk)*, 1 Hen. Black. 546. *Whitehead v. Wynn*, 5 M. & S. 427. 2 Chitt. 420. *Wynne v. Budd (Clerk)*, 5 Taunt. 629. *Wright q. t. v. Lloyd (Clerk)*, *ibid.* 306. *Wright v. Legge (Clerk)*, 6 *ibid.* 48. *Cuthcart (Clerk) v. Hardy (in error)*, 2 M. & S. 534. *Leigh q. t. v. Kent (D. D.)*, 3 T. R. 362. *Beran q. t. v. Williams*, *ibid.* 635. *Wright v. Flamank (Clerk)*, 6 Taunt. 52. *Scammell q. t. v. Willett (Clerk)*, 3 Esp. N. P. C. 29. *Jenkinson v. Thomas*, 4 T. R. 665. *Fletcher v. Dickenson*, 2 Black. (Sir W.), 906. *Doe d. Crisp v. Barber*, 2 T. R. 749. *Wynn v. Smithies*, 6 Taunt. 198. *Wynn v. Kay*, 5 *ibid.* 843. *Bagshaw v. Bossley*, 4 T. R. 78.

(2) For providing churchyards and glebe, *vide* stat. 43 Geo. 3. c. 108., amended by stat. 51 Geo. 3. c. 115.

For the exchange of parsonage houses and glebe lands by spiritual persons, *vide* stat. 55 Geo. 3. c. 147., amended by stat. 56 Geo.

3. c. 52.; stat. 1 Geo. 4. c. 6., stat. 6 Geo. 4. c. 8., stat. 7 Geo. 4. c. 66., stat. 1 & 2 Vict. c. 23., stat. 2 & 3 Vict. c. 49., & stat. 3 & 4 Vict. cc. 20. & 60.

For more effectually promoting residence by providing benefice houses, &c. *vide* stat. 5 Geo. 4. c. 89., stat. 7 Geo. 4. c. 66., stat. 1 & 2 Vict. cc. 21 & 29., stat. 1 & 2 Vict. c. 106., stat. 2 & 3 Vict. c. 49. ss. 14. & 17., stat. 3 & 4 Vict. c. 113. & stat. 5 & 6 Vict. c. 26.

(3) *Vide post*, 1208. Stat. 57 Geo. 3. c. 98. ss. 11. & 13.

(4) *Residence*:—The ancient clerical law as to residence, and its restoration by the Council of Trent, have been described by Van Espen, (*Jus Canon.* pt. 1. t. 11. De Personis,) in the following language: "Nihil adeo vocationi clericali oppositum, nihil ecclesie magis probrosum et laicis scandalosum esse quam otiosam ac inertem clericorum vitam ratione et experientia compertum est. Hinc jam pridem sollicita fuit ecclesie ne quis in clerum assumeretur nisi certo loco ascriberetur, ubi functionibus ordini suo convenientibus occuparetur et vitam clerice dignam institueret. Disciplinam hanc canone sexto concilii chalcedonensis probatam sed temporum injuria penè collapsam, restauratam volens Synodus Tridentina murendo vestigiis dicti concilii statuit ut nullus in posterum ordinatur qui illi ecclesie aut pio loco pro cujus necessitate aut val-

No spiritual person holding any benefice can accept and take to hold therewith any other benefice, unless it be situate within the distance of ten statute miles from the first-mentioned benefice.

Where the governors of the Bounty of Queen Anne are possessed, by way of benefaction or donation to poor benefices, of houses not situate within the parishes or places wherein such benefices lie, but so near thereto as to be sufficiently convenient and suitable for the residence of the officiating ministers thereof, such houses, having been previously approved by the bishop of the diocese, by writing under his hand and seal duly registered in the registry of the diocese, are to be deemed houses of residence belonging to such benefices. (1)

In all cases of rectories having vicarages endowed or perpetual curacies, the residence of the vicar or perpetual curate in the rectory house of such benefice is to be deemed a legal residence; provided that the house belonging to the vicarage or perpetual curacy be kept in proper repair to the satisfaction of the bishop of the diocese. (2)

Respecting the principle by which the computation of time is to be reckoned, the year is to be deemed to commence on the first day of January, and be reckoned therefrom to the thirty-first day of December, both inclusive.

And the months are to be taken to be calendar months, except in any case in which any month or months are to be made up of different periods less than a month, and in every such case thirty days is to be deemed a month. (3)

GENERALLY.

Stat. 1 & 2
Vict. c. 106. s. 3.
Two benefices
not to be held
together, un-
less within ten
miles of each
other.

Stat. 1 & 2
Vict. c. 106.
ss. 34, 35. 120,
& 121.

Houses pur-
chased by go-
vernors of
Queen Anne's
Bounty to be
deemed resi-
dences.

Vicar or per-
petual curate
may reside in
rectory house.

Computation
of time.

2. EXCUSES FOR NON-RESIDENCE.

By stat. 1 & 2 Vict. c. 106. s. 37. no spiritual person, being head ruler of any college or hall within either of the universities of Oxford or Cambridge, or being warden of the university of Durham, or being head master of Eton, Winchester, or Westminster School, or principal or any professor of the East India College, having been appointed such principal or professor before August 14. 1838, and not having respectively more than one benefice with cure of souls, will be liable to any of the penalties or forfeitures in the act contained for or on account of non-residence on any benefice.

By stat. 1 & 2 Vict. c. 106. s. 38. no dean of any cathedral or collegiate church, during such time as he shall reside upon his deanery, and no spiritual person having or holding any professorship or any public readership in either of the universities, while actually resident within the precincts of the university, and reading lectures therein (provided that a certificate under the hand of the vice-chancellor or warden of the university, stating the fact of such residence, and of the due performance of such duties, shall be transmitted to the bishop of the diocese wherein

EXCUSES FOR NON-RESI- DENCE.

Stat. 1 & 2
Vict. c. 106.
s. 37.

Certain persons
exempt from
penalties for
non-residence.

Stat. 1 & 2
Vict. c. 106.
s. 38.

Privileges for
temporary non-
residence.

*ditate assumitur non adscribatur ubi suis
fungitur muneribus nec incertis vagetur
sedibus.* Sess. 23. cap. 16. De Resid.

(1) S. 34.

(2) S. 35.

(3) Ss. 120, 121.

**EXCUSES FOR
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DENCE.**

the benefice held by such spiritual person is situate within six weeks after the thirty-first day of December in each year); no spiritual person serving as chaplain of the queen, or the queen dowager, or of any of the queen's children, brethren, or sisters, during so long as he shall actually attend in the discharge of his duty: no chaplain of any archbishop or bishop, whilst actually attending in the discharge of his duty as such chaplain; no spiritual person actually serving as chaplain of the House of Commons, or as clerk of the queen's closet, or as a deputy clerk thereof, while any such person shall be actually attending and performing the functions of his office; no spiritual person serving as chancellor or vicar general or commissary of any diocese, whilst exercising the duties of his office; or as archdeacon, while upon his visitation, or otherwise engaged in the exercise of his archidiaconal functions; or as dean or subdean, or priest or reader, in any of the queen's chapels at St. James's or Whitehall, or as reader in the queen's private chapels at Windsor or elsewhere, or as preacher in any of the inns of court, or at the Rolls, whilst actually performing the duty of any such office respectively; no spiritual person, being provost of Eton College, or warden of Winchester College, or master of the Charter House, or principal of St. David's College, or principal of King's College, London, during the time for which he may be required to reside and shall actually reside therein respectively — shall be liable to any of the penalties or forfeitures in the act for or on account of non-residence on any benefice for the time in any year during which he shall be so resident, engaged, or performing duties, but every such spiritual person shall, with respect to residence on a benefice under the act be entitled to account the time in any year during which he shall be so resident, as if he had legally resided during the same time on some other benefice.

Stat. 1 & 2
Vict. c. 106.
s. 39.
Performance
of cathedral
duties, &c. may
be accounted as
residence un-
der certain re-
strictions.

By stat. 1 & 2 Vict. c. 106. s. 39. any spiritual person being prebendary, canon, priest, vicar, vicar choral, or minor canon in any cathedral or collegiate church, or being a fellow of Eton or Winchester, who shall reside and perform the duties of such office during the period required by the charter or statutes, can account such residence as if he had resided on some benefice; but no such spiritual person can be absent from any benefice on account of such residence and performance of duty for more than five months together in any one year, including the time of such residence on his prebend, canonry, vicarage, or fellowship; and any spiritual person holding any such office, in which the year for the purposes of residence is accounted to commence at any other period than the 1st of January, and who may keep the periods of residence required for two successive years at such cathedral or collegiate church or college, in whole or in part, between the 1st of January and the 31st of December in any one year, can account such residence, although exceeding five months in the year, as reckoned from the 1st of January to the 31st of December, as if he had resided on some benefice.

Stat. 1 & 2 Vict.
c. 106. s. 40.
EXEMPTIONS
AND PARTIAL
EXEMPTIONS
FROM THE
PENALTIES OF
NON-RESI-
DENCE.

By stat. 1 & 2 Vict. c. 106. s. 40. every spiritual person being in possession of any benefice on August 14. 1828, and entitled by the law previously in force to exemption from residence, or to apply for a licence for non-residence, shall, as to every such benefice, but not as to any after-taken benefice, be entitled to the same exemption from residence, and to the same capacity of applying for and obtaining a licence for non-residence, and to

the same right of appeal, in case of refusal or revocation of a licence, to which he was entitled before August 14. 1838; and every bishop and other person empowered before August 14. 1838, to grant such licence, have had their powers retained.

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DENCE.

As existing rights to exemptions and licences are preserved by stat. 1 & 2 Vict. c. 106. s. 40., it may not be inexpedient to state, that by stat. 57 Geo. 3. c. 99. s. 11. any spiritual person being dean, can, during such time as he shall reside upon his deanery, or being prebendary or canon, or holding any other dignity or dignities in any cathedral or collegiate church or churches, who shall reside any period not exceeding four months altogether within the year upon such dignity or dignities can account such residence as if he had legally resided on some benefice; but any spiritual person having or holding any prebend, canonry, or dignity in any cathedral or collegiate church, in which the year for the purposes of residence is accounted to commence at any other period than the 1st of January, and who may keep the periods of residence required for two successive years at such cathedral or collegiate church, in whole or in part, between the 1st of January and the 31st of December in one year, can account such residence, although exceeding four months in the year, as reckoned from the 1st of January to the 31st of December, as if he had legally resided on some benefice; and by sect. 13. no spiritual person appointed to any prebend, canonry, or dignity in any cathedral or collegiate church, before August 14. 1838, is to be subject to any penalty or forfeiture for non-residence upon any benefice during the period of his actually residing upon such prebend, canonry, or dignity.

Stat. 57 Geo. 3.
c. 99. ss. 11. &
13.

By stat. 1 & 2 Vict. c. 106. s. 60. no spiritual person will be liable to any penalty for not residing in any house of residence during such time as a tenant shall continue adversely to occupy such house of residence, or other building or appurtenances necessary to the occupation of the same.

Stat. 1 & 2 Vict.
c. 106. s. 60.
When a tenant
occupies ad-
versely.

3. LICENCE FOR NON-RESIDENCE.

By stat. 1 & 2 Vict. c. 106. s. 32. every spiritual person holding any benefice must keep residence on his benefice, and in the house of residence (if any) belonging thereto; and if he, without any such licence or exemption, as is in the act allowed for that purpose, or unless he be resident at some other benefice of which he may be possessed, absent himself from such benefice, or from such house of residence, if any, for any period exceeding the space of three months together, or to be accounted at several times in any one year, he will, when such absence shall exceed three months and not exceed six months, forfeit one third part of the annual value of the benefice from which he shall so absent himself; and when such absence shall exceed six months and not exceed eight months, one half part of such annual value; and when such absence shall exceed eight months, two third parts of such annual value; and when such absence shall have been for the whole of the year, three fourth parts of such annual value.

LICENCE FOR
NON-RESI-
DENCE.

Stat. 1 & 2 Vict.
c. 106. s. 32.
Penalties for
non-residence,
on incumbent
if he have not
licence or ex-
emption, unless
he be resident
on another be-
nefice.

LICENCE FOR
NON-RESI-
DENCE.

In *Bluck (Clerk) v. Rackham* (1), which was an appeal from the Consistorial Court of Norwich, in a proceeding against the Rev. John Bluck, rector of the parish of Walsoken, at the instance of Matthew Rackham, to recover a penalty, under stat. 1 & 2 Vict. c. 106., for non-residence on his benefice for more than three months and not exceeding six months, between the 1st of January and 31st of December, 1842.

The regular process having issued, Mr. Bluck objected to give in his answer upon oath, as this was a criminal proceeding, and protested against the whole proceedings as null and void, on the same ground, and because the proceeding should have been by articles under the Church Discipline Act. (2) The protest as to the nullity of the proceedings was overruled; and the chancellor of Norwich, after hearing evidence, pronounced that the party proceeding had proved his allegation, and that the forfeiture of one-third of the value of his living had been incurred by Mr. Bluck, who appealed from such sentence to the Arches Court of Canterbury.

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Sir Herbert
Jenner Fust in
Bluck (Clerk)
v. Rackham,
upon the con-
struction of
stat. 1 & 2 Vict.
c. 106. s. 32.

Upon such facts, Sir Herbert Jenner Fust observed: "If I rightly collected the argument of the learned counsel for the appellant, the first and principal ground upon which this proceeding is objected to is, that it is, in fact, a criminal proceeding, and that, under the Church Discipline Act, all criminal proceedings against ministers of the Church of England, must now be carried on in the manner prescribed by that act; that the bishop of the diocese had no other authority to proceed than is given by that act, and that the course of the proceeding is to be governed by that act.

"Now the first thing to be ascertained is, whether this case is or is not within the jurisdiction of the chancellor of the diocese. The stat. 3 & 4 Vict. c. 86. s. 23. directs that 'no criminal suit or proceeding against a clerk in holy orders of the united Church of England and Ireland for any offence against the laws ecclesiastical, shall be instituted in any Ecclesiastical Court otherwise than is hereinbefore enacted and provided.' The first question, therefore, is, whether this is or is not a criminal proceeding. If it is, all parties agree that it must be according to the enactments and provisions of the act I have referred to; if it is not a criminal proceeding, there is nothing in that act to prevent the bishop from entertaining the suit, as he is empowered to do under the act 1 & 2 Vict. c. 106. The question appears, then, to come to this: whether the Residence and Pluralities Act (3) is or is not repealed by the Church Discipline Act; for if it is not repealed, then, by the 114th section of the former act, the penalty is to be sued for and recovered in the court of the bishop, and it is competent to the bishop to proceed for the recovery of the penalty in the court of the chancellor of his diocese, and he is not bound to proceed in person, but may nominate a person to sue for and recover the penalty. It never could be meant that this should be a criminal proceeding, and I have had no authority cited to show, that a proceeding for a penalty is a criminal proceeding. It is true that the proceeding is under a penal statute, and that the act is a penal act; but it does not, therefore, follow that this is a criminal suit, but it is for the recovery of a penalty; and it is clear that it was not intended to be a criminal proceeding. But it is argued that there

Whether the
Residence and
Pluralities Act
has been partly
repealed by the
Church Dis-
cipline Act.

(1) 4 Notes of Cases Ecclesiastical, 87.

(2) Stat. 3 & 4 Vict. c. 86.

(3) Stat. 1 & 2 Vict. c. 106.

is evidence in the cause of the admission of the other party of its being a criminal proceeding, because a citation was taken out calling upon the party proceeded against to give in his answers; that the other party afterwards waived the answers, and therefore acknowledged that it was a criminal proceeding, in which they could not call for answers. I can by no means say, that it is a necessary consequence, because the party proceeding waived the answers, as is often done in civil proceedings, that this is a criminal proceeding; on the contrary, it is clear that the party, on waiving the answers, makes no such admission, as there might be a reasonable doubt whether a person sued for a penalty is bound to answer in a civil proceeding. There was a doubt, and waiving the answers is no proof that the proceeding was considered to be a criminal one. There is nothing at all, I think, in this argument. This is a proceeding to recover a penalty from a party in holy orders and holding a benefice; but how is it with regard to persons not in holy orders, and not holding a benefice? Why, by sect. 117. all penalties and forfeitures incurred under the act by persons not spiritual, or by spiritual persons not holding benefices, are to be sued for and recovered 'by action of debt in any of her Majesty's courts of record at Westminster.' Is an action of debt a criminal proceeding against an individual? Under the former Pluralities and Residence Act (1), the bishop had the power to proceed for the recovery of penalties incurred by spiritual or lay persons, by action of debt in any of her Majesty's courts of record at Westminster.

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"This is, therefore, no criminal proceeding, or a proceeding which could have been carried on by articles in the Ecclesiastical Court in the shape of a criminal proceeding, the object of which is canonical punishment for an offence against the ecclesiastical law. That non-residence is an offence against the ecclesiastical law there can be no doubt, and under the general ecclesiastical law a party may be proceeded against and punished by ecclesiastical censure, — by monition, suspension, or deprivation, as may be necessary. But a new jurisdiction has been created, and a new power is given to the bishop to recover penalties in his own court by himself or by a person nominated by him for that purpose, and to say that the proceeding could be followed up by a criminal suit here, is carrying the case beyond what the words or spirit of the act of parliament would justify.

"The act provides for other matters for which parties may be punished. The 31st section enacts, that if any spiritual person shall trade or deal in any manner contrary to the provisions of the act, the bishop of the diocese in which such person shall hold any preferment, or be licensed, may cause him to be cited before his chancellor, who may, on proof of such trading, suspend such spiritual person, for the first offence, one year; for the second offence, an indefinite time, and for the third offence deprive him. Here, therefore, is a mode pointed out by which a spiritual person may be punished for illegal trading, and the bishop is authorised to sequester the profits of the preferment. How can he proceed by articles for the purpose of punishing the party by ecclesiastical censure? I cannot conceive that it could have been the intention of the legislature that this should be a criminal proceeding, looking at the words of the act of parliament, which enacts that the

(1) Stat. 57 Geo. 3. c. 99.

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penalties may be 'sued for and recovered in the court of the bishop;' and at the 31st section, by which a proceeding for suspension and deprivation is authorised in the court of the bishop. It is nothing to say, that the party may be proceeded against under the general law, and may be punished twice for the same offence; that is, that the bishop may proceed by articles for non-residence, under the general law, and also proceed for a penalty under the 1 & 2 Vict. c. 106.; it will be time enough to consider this objection when such a case takes place. The argument goes too far; because it is, as if to say, that no married clergyman could be proceeded against in these courts by his wife for separation by reason of his adultery, because that is a criminal proceeding, and it is an ecclesiastical offence too. I see no reason why proceedings for a penalty should not be had in these courts in a civil form, which seems a more convenient form than by articles. It never could have been the intention of the legislature to repeal the 1 & 2 Vict. c. 106. by the Church Discipline Act.

"I am, therefore, of opinion, with respect to the first objection, that it is not sustainable; that this is not a criminal proceeding obliging the party to proceed under the Church Discipline Act; but that, in fact and in substance, it is a civil proceeding for the recovery of a penalty, and being a civil proceeding, it is to be carried on, as all other civil suits, by libel and allegation. I am of opinion that, under the 1 & 2 Vict. c. 106. the chancellor of the diocese of Norwich had jurisdiction to entertain this suit, and that the proceedings in the suit were properly carried on by libel and allegation, and by the examination of witnesses; and then the question resolves itself into this single point, —whether there is sufficient proof that the party was absent from his benefice for a period of time exceeding three months, and not exceeding six months, from the 1st January to the 31st December, 1842.

"Now it should be, in the first instance, proved that the party suing was properly appointed by the bishop; and his nomination, under the hand and seal of the bishop, to sue for and recover the penalty, appears in the process: the party is, therefore, duly qualified to proceed.

"Witnesses have been examined to prove the institution and induction of this gentleman, in February, 1841. Other witnesses prove the fact that he did not reside in the residency house, between the 29th August and the 31st December, 1842.

"It has been contended that it should have been proved, not only that the party did not reside at the parsonage house, but that he was not resident in the parish,—that he was not residing at some lodging house. Now it appears to me that the proof is sufficient under the 32d section of the act, which enacts that 'every spiritual person holding any benefice shall keep residence on his benefice, and in the house of residence (if any) belonging thereto:—not 'or,' but 'on his benefice *and* in the house of residence.' Then if he was not residing in the house belonging to the benefice, he was not resident on his benefice, according to the requisites of the act of parliament, which requires that he shall reside in the parsonage house, otherwise he is not resident on his benefice. The statute requires that he shall be resident in the parsonage house, and its whole scope and intention is that, if the spiritual person shall reside in any other house than the parsonage house, he shall at least keep it in repair, and if he does not, he is liable

to a penalty for non-residence. [Curteis. — They do not plead that there is a house of residence, and in fact there is not.] The citation is for non-residence on his benefice for the space of three months and not exceeding six months without licence or exemption, and without being resident on any other benefice. You admitted in your argument that he was not residing at the residency house. [Curteis. — The offence was put on his not residing within his benefice, not that he was not residing at the house of residence; whereas the proof is that he was not residing in the house only.] There is the evidence of a person who resided in his house from the 29th August, 1842, to March, 1843. Others were employed by the party himself for the purpose of protecting his premises during his absence. He tells some of the witnesses that he was going away to a watering-place for some months, and is met going to Wisbeach with luggage. It is proved that he was not resident in the parish, as far as it can be proved, unless he was to be looked for in every house in the parish. Is not this sufficient evidence, *prima facie*, to prove non-residence on his benefice at the time? If the party proceeding is to be held to stricter proof, it would be impossible for any one to proceed, and the act would become a nullity. He may be as well required to prove that the party was not resident on any other benefice, or that he was not master or head of any college or hall at Oxford or Cambridge, or warden of Durham College, or head master of Eton, Winchester, or Westminster School, or principal or professor at the East India College, or chaplain to the Queen or House of Commons, or preacher at any Inn of Court. Is it to be shown that the party is not within any of the exemptions before any proceeding can be had under the statute? It would be impossible; instead of one third of the income, the expense would swallow up the whole, and no proceeding could be had to recover a penalty if such proof were required. Reference has been made to proceedings under the game laws, and it is said that it is necessary to prove the want of qualification. Not at all. Mr. Phillips (1) says, 'In an action on the game laws, though the plaintiff must aver, in order to bring the defendant within the act, that he was not duly qualified, yet it is not necessary to disprove his qualification; but it will be for the defendant, if he can, to prove himself qualified.' I am quite satisfied that, in this class of cases, as well as those under the game laws, where the facts are in possession of the party proceeded against, to enable him to repel the charge, if a *prima facie* case is made out against him, he is to show that he is within the exemption, or that he was actually resident within the parish, though no house of residence may be provided for him, taking it as a fact, as it is said to be, that no house of residence is provided on the living. There is evidence of his having said he was going to a watering-place, of his having been seen on the road in a carriage with luggage, and that another person had performed the duty of the church. Surely, it cannot be said that this is not sufficient, *prima facie*, to call upon the party proceeded against to rebut the proof so produced. I consider that there is sufficient evidence to show, that he did not reside on his benefice, — there being no house of residence, as I am now informed, — from the 29th August, 1842, to the 31st December, 1842, sufficient at least to call upon the party for his defence. But he has made no

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(1) On Evid. c. 7. s. 4.

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defence, either by plea or by interrogatories; he appeared absolutely, and although, it is true, there was a protest on his part against the nullity of the proceeding, that protest was not followed up, for his proctor appeared and prayed justice; so that all the proceedings in the court below were without any protest.

“It is said that the proxy was not transmitted in the process; but in the minutes of the Court it is expressly recited, that his proctor exhibited proxy, and if the party conceived that this was any ground of objection, he should have called for omissa, or given notice to the other party of his intention to call for the exhibition of the proxy, and the other party might have had a monition.

“On the whole, I am of opinion that the judge in the court below did right in pronouncing that the party had incurred the forfeiture of one third of the annual value of his benefice, and, accordingly, I affirm his sentence.

“The value of the one third of the income is another consideration. That must be ascertained in the court below, by reference to the registrar; I cannot ascertain the value. The sentence of this Court is, to pronounce against the appeal, to affirm the sentence appealed from, to remit the cause, and condemn the appellant in the costs of the appeal.”

**Judgment of
Dr. Lushington
in *Bluck*
(*Clerk*) *v. Rack-*
*ham.***

This judgment was appealed from before the Judicial Committee of the Privy Council (1), when Dr. Lushington observed, “The cause is now brought up by appeal to this court, and various objections have been taken to the legality of the proceedings, and it is contended, that the whole of the proceedings are illegal, and, consequently, that the sentence must be reversed, and the party proceeded against dismissed.

“The leading objection is founded upon the construction which the appellant’s counsel contend ought to be put upon the provisions of the 3 & 4 Vict. c. 86. called the Clergy Discipline Act. It is said, that the present proceeding is a criminal proceeding within the meaning of that statute, and that by the 23d section of that act, no criminal proceeding can be prosecuted against a clergyman in any Consistorial Court, but that the proceedings must be in the form and manner prescribed by the act. The words of the 23d section are, ‘No criminal suit or proceeding against a clerk in holy orders of the united Church of England and Ireland, for any offence against the laws ecclesiastical, shall be instituted in any Ecclesiastical Court, otherwise than is hereinbefore enacted or provided.’

“Now what is a criminal suit or proceeding against a clerk in an Ecclesiastical Court for an ecclesiastical offence? We apprehend that the meaning of this expression has been long and universally settled, and that the presumption of law is, that the legislature used it, in its accustomed meaning.

“A criminal suit is distinguished in the Ecclesiastical Courts from a civil proceeding in its very commencement, and in most essential particulars. 1. A criminal suit commences by obtaining the permission of the judge to promote his office, and the party gives bond to the judge to keep him harmless. 2. The citation expressly calls upon the party cited to answer to articles touching his soul’s health, and the lawful correction of

(1) *Bluck v. Rackham*, 4 Notes of Cases Ecclesiastical, 534.

his manners, &c. 3. The suit is by articles, and not allegation or libel, and must be conducted with a strictness peculiar to this mode of proceeding.

"This well-known proceeding,—and there is no other criminal suit or proceeding known to the ecclesiastical law,—is the criminal suit intended by the 29d section.

"Then, is the present proceeding, under the 1 & 2 Vict. c. 106., a criminal proceeding according to the usual acceptation of the term? It does not resemble a criminal proceeding, according to that acceptation of the term, in any one of the essential particulars which have been stated; on the contrary, the citation, and the allegation, and all that has been done, are in the form well known in those courts as the civil form.

"If this be so, then, as the Clergy Discipline Act contemplates only criminal proceedings, known as such, the carrying on the present suit is not prohibited by this act of parliament.

"But the objection has been put into another form. It was argued, and most truly said, that the present suit was in the civil form, but that the object was to punish; and that, therefore, the object being punishment, the only form of proceeding was the criminal form of proceeding, and that the adoption of the civil form was contrary to law, and therefore the whole was a nullity. If the criminal form was the only legal form of proceeding under the statute 1 & 2 Vict. c. 106., then the inference will be true; but that question depends upon the construction to be put upon that statute, and the practice of Ecclesiastical Courts.

"It must be admitted that non-residence is an ecclesiastical offence, and that, before the passing of any of the modern statutes, a non-resident incumbent might be prosecuted in the criminal form in any proper Ecclesiastical Court, and might have been punished by suspension or deprivation, but not by the imposition of any fine or penalty. In order more effectually to secure residence, the ancient remedy by criminal proceedings in the Ecclesiastical Court being found insufficient, the legislature, following the example of former acts, by the act of 1 & 2 Vict. c. 106., has imposed certain penalties. These penalties are imposed by the 32d section of that statute, and the mode of recovery is regulated by the 114th section. Now do the words of the statute import an intention of the legislature that the penalties should be sued for in the criminal or the civil form? The 114th section enacts, 'That all penalties and forfeitures which shall be incurred under this act by any spiritual person holding a benefice shall and may be sued for and recovered in the court of the bishop of the diocese in which such benefice is situate, and by some person duly authorised for that purpose by such bishop, by writing under his hand and seal, and in no other court, and by or at the instance of no other person whatever.' Now it appears to their lordships, that the words 'suing' and 'recovering' are wholly inapplicable to the well-known criminal form; had it been intended to require the criminal form, surely the expressions would have been wholly different; power would have been given to promote the office of the judge, and power to the judge to affix the penalty. Not only does not this section contain any words importing that the criminal form should be adopted, but the whole practice of the Ecclesiastical Courts has been to the contrary. There is no instance that their lordships have been apprised of, in which penalties have been sued for in the criminal form, or any forfeiture

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NON-RESI-
DENCE.

Judgment of
Dr Lushington
in *Bluck*
(*Clerk*) v.
Rackham.

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DENCE.**

of money decreed. On the other hand, though, from the limited jurisdiction of these courts, there cannot be many classes of cases, yet we find the proceedings to recover tithes, under the statute 2 & 3 Edw. 6., where double the value in addition is given by way of penalty, and to be recovered before the ecclesiastical judge, according to ecclesiastical law, have always been in the civil form.

“ For these reasons, their lordships are of opinion that the civil form was properly adopted in this case.

“ Then, if the civil form was properly adopted, all the incidents to it must necessarily follow.” (1)

Stat. 1 & 2 Vict.
c. 106. s. 33.
Licence to re-
side out of the
usual house, if
unfit.

By stat. 1 & 2 Vict. c. 106. s. 33. any bishop can, upon application in writing by any spiritual person holding any benefice within his diocese whereon there shall be no house or no fit house of residence, by licence under his hand and seal, (but which must be registered in the registry of the diocese,) permit him to reside in some fit and convenient house, although not belonging to the benefice, (the house being particularly described and specified in the licence), and for a certain time not exceeding the period by the act limited, and can from time to time, as he may think fit, renew the licence; and every such house will be a legal house of residence for the specified time to all intents and purposes; but no licence is to be granted to reside in any house unless it be within three miles of the church or chapel of the benefice, nor in case the church or chapel be in any city, or market, or borough town, unless the house be within two miles of the church or chapel.

Stat. 1 & 2 Vict.
c. 106. s. 42.
Every petition
for licence for
non-residence
to be in writ-
ing, and to
state certain
particulars.

By stat. 1 & 2 Vict. c. 106. s. 42. every spiritual person applying for a licence for non-residence must present to the bishop a petition signed by himself or by some person approved by the bishop, and state therein whether such spiritual person intends to perform the duty of his benefice in person, and in that case where and at what distance from the church or chapel of such benefice he intends to reside; and if he intend to employ a curate the petition must state what salary he proposes to give to such curate, and whether the curate proposes to reside or not to reside in the parish in which such benefice is situate; and if the curate intend to reside therein, then whether in the house of residence belonging to the benefice, or in some and what other house, and if he do not intend to reside in the parish, then such petition must state at what distance therefrom, and at what place, such curate intends to reside, and whether he serves any other and what parish as incumbent or curate, or has any and what cathedral preferment, and any and what benefice, or officiates in any other and what church or chapel: and the petition must also state the annual value and the population of the benefice in respect of which any licence for non-residence shall be applied for, and the number of churches or chapels, if more than one, upon the benefice, and the date of the admission of the spiritual person to the benefice; but the bishop cannot grant any such licence, unless the petition contain a statement of the foregoing particulars: and every petition must be filed in the registry of the diocese by the registrar thereof, and be open to inspection, and copies thereof made, with the leave in writing of the bishop.

(1) *Vide ante*, 1063. tit. PROHIBITION.

By stat. 1 & 2 Vict. c. 106. s. 43. the bishop, upon such petition being presented to him, and upon such proofs being adduced as to any facts stated in it as he may think necessary, can grant, in such cases as are thereafter enumerated, a licence in writing under his hand for such spiritual person to reside out of the proper house of residence of his benefice, or out of the limits of his benefice, or out of the limits prescribed by the act, for the purpose of exempting him from any pecuniary penalty in respect of non-residence thereon; which licence must express the cause of granting the same; (that is to say,) to any spiritual person who shall be prevented from residing in the proper house of residence or within the limits of such benefice, or within the limits prescribed by the act, by any incapacity of mind or body; and also, for a period not exceeding six months, to any spiritual person on account of the dangerous illness of his wife or child making part of his family, and residing with him as such; but that no such licence on account of the illness of a wife or child shall be renewed, save with the allowance of the archbishop of the province previously signified under his hand in pursuance of a recommendation in writing from the bishop, setting forth the circumstances, proofs, and reasons which induce him to make such recommendation; and also to any spiritual person having or holding any benefice wherein there shall be no house of residence (1), or where the house of residence shall be unfit for the residence of such spiritual person, such unfitness not being occasioned by his negligence, default, or other misconduct, and that he has kept such house of residence, if any, and the buildings belonging thereto, in good and sufficient repair and condition to the satisfaction of the bishop, and a certificate under the hand of two neighbouring incumbents, countersigned by the rural dean, if any, that no house convenient for the residence of such spiritual person can be obtained within the parish, or within the limits prescribed by the act, being first produced to the bishop; and the bishop can also grant to any spiritual person holding any benefice, and occupying in the same parish any mansion or messuage whereof he shall be the owner, a licence to reside in such mansion or messuage, such spiritual person keeping the house of residence and other buildings belonging thereto in good and sufficient repair and condition, and producing to the bishop proof to his satisfaction at the time of granting every such licence of such good and sufficient repair and condition; provided, that any such spiritual person, within one month after refusal of any such licence, may appeal to the archbishop of the province, who can confirm such refusal, or direct the bishop to grant a licence under the act.

By stat. 1 & 2 Vict. c. 106. s. 44. any bishop can, in any case not therein before enumerated, in which he shall think it expedient, grant to any spiritual person holding any benefice within his diocese a licence to reside out of the limits of his benefice; provided that in every such case, the nature and special circumstances thereof, and the reasons that have induced the bishop to grant such licence, be forthwith transmitted to

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DENCE.

Stat. 1 & 2 Vict.
c. 106. s. 43.
Bishop may
grant licences
for non-resi-
dence in cer-
tain enume-
rated cases.

Appeal to arch-
bishop in case
of refusal.

Stat. 1 & 2 Vict.
c. 106. s. 44.
In cases not
enumerated
bishops may
grant licences
to reside out of
limits of bene-

(1) Respecting the powers of bishops to enforce the erection of glebe houses, vide case of the *R. v. James Harby Dunstford*, reported in Stephens' Ecclesiastical Statutes 1851—1859.

**LICENCE FOR
NON-RESI-
DENCE.**

fee, subject to allowance by the archbishop.

Stat. 1 & 2 Vict. c. 106. s. 45.
By whom licences may be granted, while a see is vacant, &c.

Stat. 1 & 2 Vict. c. 106. s. 46.
Duration of licences.

Stat. 1 & 2 Vict. c. 106. s. 47.
Fee for licence.

Stat. 1 & 2 Vict. c. 106. s. 48.
Licences not to be void by the death or removal of the grantor.

Stat. 1 & 2 Vict. c. 106. s. 49.
Licences may be revoked.

Stat. 1 & 2 Vict. c. 106. s. 50.
Copies of licences or revocations to be filed in the registry of the diocese, and a list kept for inspection; and copies trans-

the archbishop of the province, who must forthwith proceed therein as hereinafter provided in cases of appeal, and allow or disallow such licence in the whole or in part, or make any alteration therein, as to the period for which the same may have been granted or otherwise; and no such licence will be valid unless it have been so allowed, and the allowance signified by the signing thereof by the archbishop; but it will not be necessary in the licence to specify the cause of granting the same.

By stat 1 & 2 Vict. c. 106. s. 45., during the vacancy of any see the power of granting licences of non-residence under the act, subject to the regulations therein contained, is to be exercised by the guardian of the spiritualities of the diocese; or in case the bishop of any diocese be disabled from exercising in person the functions of his office, such power is to be exercised by the persons lawfully empowered to exercise his general jurisdiction in the diocese; but no licence granted by any other than the bishop will be valid, until the archbishop of the province has signified his approbation of the licence by signing the same.

By stat. 1 & 2 Vict. c. 106. s. 46. no licence for non-residence granted under the act, or under stat. 57 Geo. 3. c. 99. is to continue in force after the thirty-first day of December in the year next after the year in which such licence shall have been or shall be granted.

By stat. 1 & 2 Vict. c. 106. s. 47. every person obtaining any licence of non-residence must pay for it to the secretary or officer of the bishop, or other person granting it, the sum of ten shillings, over and above the stamp duty chargeable thereon, and no more, and also the sum of three shillings, and no more, to the registrar of the diocese, and also pay the sum of five shillings to the secretary of the archbishop, when the licence has been signed by the archbishop.

By stat. 1 & 2 Vict. c. 106. s. 48. no licence of non-residence is to become void by the death or removal of the bishop granting the same, but to remain valid, notwithstanding any such death or removal, unless revoked as thereinafter mentioned.

By stat. 1 & 2 Vict. c. 106. s. 49. any archbishop or bishop who shall have granted any licence of non-residence, or his successor, after having given the incumbent sufficient opportunity of showing reason to the contrary, can in any case in which there may appear to such archbishop or bishop good cause for revoking the same (1), by an instrument in writing under his hand, revoke any such licence; but the incumbent can, within one month after service upon him of such revocation, if by a bishop, appeal to the archbishop of the province, who can confirm or annul the same.

By stat. 1 & 2 Vict. c. 106. s. 50. every bishop who shall grant or revoke any licence of non-residence under the act, is required, within one month after the grant or revocation of such licence, to cause a copy of every such licence or revocation to be filed in the registry of his diocese; and an alphabetical list of such licences and revocations is to be made out by the registrar of the diocese, and entered in a book, and kept for the inspection of all persons, upon payment of three shillings, and no more; and a copy of every such licence, and a statement in writing of the grounds of

(1) Vide *Bogshaw v. Bosky (Clerk)*, 4 T. R. 78.

exemption, is to be transmitted by the spiritual person to whom such licence shall have been granted, or who may be exempted from residence, to the churchwardens or chapelwardens of the parish or place to which the same relates, within one month after the grant of such licence, or of his taking advantage of such exemption, as the case may be; and every bishop revoking any such licence, shall cause a copy of such revocation to be transmitted, within one month after the revocation thereof, to the churchwardens or chapelwardens of the parish or place to which it relates; which copies of licence revocation, and statement of exemption, shall be by such churchwardens or chapelwardens deposited in the parish chest, and be produced by them, and publicly read by the registrar or other officer, at the visitation of the ecclesiastical district within which such benefice shall be locally situate, next succeeding the receipt thereof; and every spiritual person who neglects to transmit a copy of such licence or statement of exemption, will lose all benefit of the licence, and until he shall have transmitted such statement, will not be entitled to the benefit of the exemption; provided, that in case the archbishop of the province shall on appeal to him annul the revocation of any licence, the bishop by whom the revocation shall have been made, shall immediately on receiving notice from the archbishop that he has annulled the same, order, by writing under his hand, that the copies of the revocation be forthwith withdrawn from the registry and parish chest, and that the same be not produced and read at the visitation, and that the revocation be erased from the list of revocations in the registry; which order will be binding on the registrar and churchwardens respectively to whom it shall be addressed.

By stat. 1 & 2 Vict. c. 106. s. 51. every archbishop who in his own diocese grants any licence of non-residence, or who may approve and allow any such licence in any case not enumerated in the act, or any renewal of a licence in the case of the dangerous illness of the wife or child of any spiritual person, is annually in the month of January to transmit to her Majesty in council a list of all licences or renewals so granted or allowed by such archbishop respectively in the year ending on the last day of December preceding such month of January, and in every such list to specify the reasons which have induced him to grant or allow each licence or renewal, together with the reasons transmitted to him by the bishops for granting or recommending each licence in their respective dioceses; and her Majesty in council can revoke and annul any licence; and transmit the order to the archbishop who shall have granted the licence or renewal, who shall thereupon cause a copy of the order to be transmitted to the bishop of the diocese in which the licence shall have been granted; and who shall cause a copy of the mandatory part of the order to be filed in the registry of the diocese, and a like copy to be delivered to the churchwardens or chapelwardens of the parish or place to which the same relates, in manner thereinbefore directed as to revocation of licences; and every such archbishop is to cause a copy of the mandatory part of every order made in relation to any licence granted by him in his own diocese to be in like manner filed in the registry of his diocese, and a like copy also to be delivered to the churchwardens or chapelwardens of the parish or place to which the licence shall relate in manner before

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NON-RESI-
DENCE.

mitted to
churchwar-
dens, and pub-
licly read at the
first visitation.

Stat. 1 & 2
Vict. c. 106.
s. 51.

List of licences
allowed by the
archbishop, or
granted in his
own diocese, to
be annually
transmitted to
the queen in
council, who
may revoke li-
cences, &c.

**LICENCE FOR
NON-RESI-
DENCE.**

Licence, al-
though re-
voked, to be
deemed valid
between the
grant and re-
vocation.

Stat. 1 & 2
Vict. c. 106.
s. 52.

Incumbents to
answer ques-
tions transmit-
ted to them by
bishop.

mentioned; provided that after the licence shall have been so revoked by her Majesty, [the same, in all questions that shall have arisen or may there- after arise touching the non-residence of the spiritual person to whom the same shall have been granted, between the time at which the same was granted or approved and allowed and the time of the revocation thereof being so filed in the registry, shall be deemed valid.

By stat. 1 & 2 Vict. c. 106. s. 52. each bishop is required to transmit, some time in the month of January in each year, to every spiritual person holding any benefice within his diocese or jurisdiction, the questions contained in the first schedule to the act, for the purpose of better enabling the several bishops to make the returns thereafter mentioned; and every spiritual person to whom the questions shall be so transmitted shall, within three weeks from the day on which the same shall be delivered to him, or to the officiating minister of the benefice for the time being, make and transmit to the bishop full and specific answers thereto, the answers being signed by the spiritual person. (1)

(1) The following are the questions to be annually transmitted by each bishop to every spiritual person holding any benefice within his diocese or jurisdiction, and to which reference has been made in the foregoing section:—

“1. What is the name of your benefice?

“2. In what county?

“3. Name of incumbent, and date of admission?

“4. Is there a glebe house belonging to your benefice?

“5. Were you resident in the glebe house, or, there being no glebe house, or none fit for your residence, were you resident in any and what house appointed by the bishop in his licence, during the last year, for the term prescribed by law?

“6. Being non-resident, were you performing the duties of your parish for the said time? If so, state where you resided, and at what distance from the church or chapel.

“7. Were you in the last year serving any other church or chapel in the neighbourhood as incumbent? If so, state the name thereof, and the distance from the above-named church or chapel; and when and for how long you served the same.

“8. Were you serving any other church or chapel in the neighbourhood as curate? If so, state the name thereof, and the distance from your own church or chapel; and when and for how long you served the same.

“9. What are the services in your church? Is a sermon or lecture given at every or which of such services?

“10. Were these services duly performed last year? If not, for what reason?

“11. What are the services in your chapel or chapels, if any? Is a sermon or lecture given at every or which of such services?

“12. Were these services duly performed last year? If not, for what reason?

“13. Have you any assistant curate or

curates? If so, state his or their names; also whether he or they is or are licensed, and the amount of his or their stipend or respective stipends.

“14. If you were non-resident, were you so by licence?

“15. If non-resident by licence, state the ground of licence, and the time when it will expire.

“16. If non-resident without licence, were you so by exemption?

“17. If non-resident by exemption, state the ground of exemption, and whether such exemption was claimed for the whole year, or during what part thereof.

“18. If you were non-resident, and did not perform the duties of your benefice, what ecclesiastical duties, if any, were you performing, and where do you now reside?

“OBSERVE.—The foregoing questions are to be answered by every incumbent, whether resident or not.

“Further questions to be answered, in addition to the foregoing, in case the incumbent be non-resident.

“19. What is the name of your curate?

“20. Does he reside in the glebe house?

“21. Does he pay any and what rent or consideration for the use of the glebe house; or is any deduction made on account thereof from the stipend assigned to him in his licence?

“22. If not resident in the glebe house, does he reside in the parish?

“23. If not resident in the parish, where does he reside, and at what distance from your church or chapel?

“24. Does he serve any other church or chapel as incumbent? If so, state the name thereof, and the distance from your own church or chapel.

“25. Does he serve any other church or chapel as curate? If so, state the name thereof and the distance from your own church or chapel.

There does not seem to be any specified penalty if the officiating minister do not transmit the answers to the bishop within the prescribed period—he may perhaps be punished under the Church Discipline Act for such neglect, as, seemingly, it would be an offence against the laws ecclesiastical.

By stat. 1 & 2 Vict. c. 106. s. 53., on or before the twenty-fifth day of March in every year a return shall be made to her Majesty in council by every bishop of the name of every benefice within his diocese or jurisdiction, and the names of the several spiritual persons holding the same respectively, who shall have resided thereon; and also the names of the several spiritual persons who, by reason of any exemption under the act, or by reason of any licence granted by such bishop, shall not have resided on their respective benefices; and also the names of all spiritual persons, not having any such exemption or licence, who shall not have resided on their respective benefices, so far as the bishop is informed thereof; and also the substance of the answers received in all cases to the questions so transmitted.

LICENCE FOR
NON-RESI-
DENCE.

Stat. 1 & 2
Vict. c. 106.
s. 53.
Annual return
to be made to
the queen in
council of re-
sidents and
non-residents,
&c.

4. PENALTIES FOR, AND EFFECT OF, NON-RESIDENCE. ¹

By stat. 1 & 2 Vict. c. 106. s. 54., in every case in which it shall appear to the bishop that any spiritual person holding any benefice within his diocese, and not having a licence to reside elsewhere than in the house of residence belonging thereto, nor having any legal cause of exemption from residence, does not sufficiently, according to the true meaning and intent of the act, reside on such benefice, the bishop can, instead of proceeding for penalties under the act, or for penalties incurred before the passing of the act under stat. 57 Geo. 3. c. 99., or after proceeding for the same, issue a monition to such spiritual person, requiring him forthwith to proceed to and to reside on his benefice, and perform the duties thereof, and to make a return to the monition within a certain number of days after the issuing thereof: provided that in every such case there shall be thirty days between the time of serving such monition on such spiritual person, in the manner thereafter directed, and the time specified in the monition for the return thereto; and the spiritual person on whom any such monition shall be served shall, within the time specified for that purpose, make a return thereto into the registry of the diocese, to be there filed; and the bishop to whom any such return shall be made can require such return or any fact contained therein to be verified by evidence; and in every case where no such return shall be made, or where such return shall not state such reasons for the non-residence of such spiritual person as shall be deemed satisfactory by the bishop, or where such return, or any of the facts contained therein, shall not be so verified when such verification shall have been required, the

PENALTIES FOR,
AND EFFECT OF,
NON-RESI-
DENCE.

Stat. 1 & 2
Vict. c. 106.
s. 54.
Residence may
be enforced by
monition, or
the living se-
questered.

¹ 26. Is he licensed?

² 27. What is his salary from you?

³ 28. Has he from you any other allow-
ances or emoluments? State what and the
average value thereof respectively.

⁴ 29. What is the gross and what is the
net annual value of your benefice?

⁵ N. B. — All the questions have reference
to the year immediately preceding that in
which they are transmitted.

**PENALTIES FOR,
AND EFFECT OF,
NON-RESI-
DENCE.**

bishop can issue an order in writing, under his hand and seal, requiring such spiritual person to proceed and reside as aforesaid within thirty days after such order shall have been served upon him in like manner as is thereinafter directed with respect to the service of monitions (1); and in case of non-compliance with such order, the bishop can sequester the profits of such benefice until such order shall be complied with, or such sufficient reasons for non-compliance therewith shall be stated and proved; and to direct, by any order to be made for that purpose under his hand, and filed as aforesaid, the application of such profits, after deducting the necessary expenses of serving the cure, either in the whole or in such proportions as he shall think fit, in the first place to the payment of the penalties proceeded for, if any, and of such reasonable expenses as shall have been incurred in relation to such monition and sequestration; and in the next place towards the repair or sustentation of the chancel, house of residence of such benefice, or of any of the buildings and appurtenances thereof, and of the glebe and demesne lands; and in the next place, where such benefice shall be likewise under sequestration at the suit of any creditor, then towards the satisfaction of such last mentioned sequestration; and after the satisfaction thereof, then and in the next place towards the augmentation or improvement of any such benefice, or the house of residence thereof, or any of the buildings and appurtenances thereof, or towards the improvement of any of the glebe or demesne lands thereof; or to order and direct the same, or any portion thereof, to be paid to the treasurer of the governors of the Bounty of Queen Anne, for the purposes of the bounty, as such bishop shall, in his discretion, under all circumstances, think fit and expedient; and the bishop can, within six months after such order for sequestration, or within six months after any money shall have been actually levied by such sequestration, remit to such spiritual person any proportion of such sequestered profits, or cause the same or any part thereof, whether the same remain in the hands of the sequestrator, or shall have been paid to the treasurer, to be paid to such spiritual person; and every such sequestrator, at the suit of the bishop, is required, upon receiving an order under the hand of such bishop, forthwith to obey the same; and the treasurer is required, upon receiving a like order from such bishop, to make such payment out of any money in his hands; provided that any such spiritual person may, within one month after service upon him of the order for any such sequestration, appeal to the archbishop of the province, who shall make such order relating thereto, or to the profits that shall have been so sequestered as aforesaid, for the return of the same or any part thereof to such spiritual person, or to such sequestrator at the suit of any creditor (as the case may be), or otherwise as may appear to such archbishop to be just and proper; but nevertheless such sequestration shall be in force during such appeal.

Appeal against
sequestration
to the arch-
bishop.

Stat. 1 & 2
Vict. c. 106.
s. 55.
Incumbent re-

By stat. 1 & 2 Vict. c. 106. s. 55. every spiritual person to whom any such monition or order in writing shall be issued, who shall be at the time of the issuing thereof absent from his benefice, contrary to the provisions of the

(1) *Service of monitions*: — In *Green v. Colston* (2 Bing. N. C. 627.) it was held, that where the incumbent of a benefice cannot be found, service of a monition, by leaving

it at the parsonage house, was sufficient, notwithstanding the incumbent did not habitually reside in it.

act, but who shall forthwith obey such monition or order, and the profits of whose benefice shall by reason of such obedience not be sequestered, shall nevertheless pay all costs, charges, and expenses incurred by reason of the issuing and serving such monition or order, and the proceedings therein shall not be stayed until such payment be made.

By stat. 1 & 2 Vict. c. 106. s. 56., if any spiritual person, not having a licence to reside out of the limits of his benefice, nor having other lawful cause of absence from the same, who after any monition or order requiring him to reside, and before or after any sequestration, shall in obedience to any such monition or order have begun to reside upon his benefice, shall afterwards, and before the expiration of twelve months next after the commencement of such residence, wilfully (1) absent himself from such benefice for the space of one month together, or to be accounted at several times, the bishop can, without issuing any other monition or making any order, sequester and apply the profits of the benefice, for the purpose of enforcing the residence of such spiritual person, according to the true intent of the original monition issued by the bishop; and the bishop can proceed in like cases from time to time as often as occasion may require; provided that in each such case such spiritual person may, within one month after the service upon him of the order for any such sequestration, appeal to the archbishop of the province, who shall make such order relating thereto or to the profits sequestered, or to any part thereof, as to him may seem just and proper, but nevertheless such sequestration shall be in force during such appeal.

By stat. 1 & 2 Vict. c. 106. s. 57., in every case in which any archbishop or bishop think proper, after proceeding by monition for the recovery of any penalty under the act for non-residence of more than one third part of the yearly value of any benefice for any non-residence exceeding six months in the year, to remit the whole or any part of such penalty, such archbishop shall forthwith transmit to her Majesty in council, and such bishop shall forthwith transmit to the archbishop of the province to which he belongs, a statement of the nature and special circumstances of each case, and the reasons for the remission of the penalty; and it shall thereupon be lawful for her Majesty in council, or for the archbishop, as the case may be, to allow or disallow such remission in whole or in part, in the same manner as is provided in the act with relation to the allowance or disallowance of licences of non-residence granted in cases not thereinbefore expressly enumerated; but the decision of the archbishop with respect to cases transmitted to him from a bishop are final.

By stat. 1 & 2 Vict. c. 106. s. 58., if the benefice of any spiritual person continue for the space of one whole year under sequestration issued under the provisions of the act for disobedience to the bishop's monition or order requiring such spiritual person to reside on his benefice, or if such spiritual person, under the provisions of the act, incur two such sequestrations in the space of two years, and be not relieved with respect to either of such

PENALTIES FOR, AND EFFECT OF, NON-RESIDENCE.

turning to residence on monition to pay the costs.

Stat. 1 & 2 Vict. c. 106. s. 56.

Incumbent returning to residence on monition, but again absenting himself within twelve months, the bishop may, without further monition, sequester.

Stat. 1 & 2 Vict. c. 106. s. 57.

Reasons for remitting penalties for non-residence of a certain amount to be transmitted to the queen in council.

Stat. 1 & 2 Vict. c. 106. s. 58.

Benefice continuing so sequestered one year, or being twice so sequestered within two years, to become void.

(1) *Wilfully*:—This is the word used in stat. 21 Hen. 8. c. 13., and also in stat. 57 Geo. 3. c. 99., in cases of general non-residence: therefore, when there was no house of residence (*Goodale v. Butler*, Cro. Eliz. 590.), or if the incumbent were imprisoned

without covin, or was removed by medical advice on account of his health (*Martin v. Gunnystone*, 2 Bulst. 18.), he did not come within the statute. Rogers' Eccles. Law, 800. See *ride*, as to imprisonment for debt, *Vaux v. Vollans* (Clerk), 4 B. & Ad. 525.

**PENALTIES FOR,
AND EFFECT OF,
NON-RESI-
DENCE.**

sequestrations upon appeal, such benefice will thereupon become void ; and the patron of such benefice can make donation, or present or nominate to the same as if such spiritual person were dead ; and the bishop, on such benefice so becoming void, can give notice in writing under his hand to the patron, which notice shall either be delivered to the patron or left at his usual place of abode, or if his place of abode be unknown, or he be out of England, such notice is to be twice inserted in the London Gazette, and also twice in some newspaper printed and usually circulated in London, and in some other newspaper usually circulated in the neighbourhood of the place where such benefice is situate ; and for the purposes of lapse the avoidance of the benefice is to be reckoned from the day on which the notice was delivered, or from the day on which six months shall have expired after the second publication of the notice in the London Gazette, as the case may be ; and every notice in the Gazette and newspaper must state that the patron or the place of abode of the patron is unknown, or that he is said to be out of England, as the case may be, and that the benefice will lapse, at the furthest, after the expiration of one year from the second publication thereof ; and upon any such avoidance the patron cannot appoint by donation, or present or nominate to such benefice so avoided, the person by reason of whose non-residence the same was avoided.

Stat. 1 & 2
Vict. c. 106.
s. 114.
Recovery of
penalties
against spiri-
tual persons.

By stat. 1 & 2 Vict. c. 106. s. 114. all penalties and forfeitures incurred under the act by any spiritual person holding a benefice may be sued for and recovered in the court of the bishop of the diocese in which such benefice is situate, and by some person duly authorised for that purpose by the bishop by writing under his hand and seal, and in no other court, and by or at the instance of no other person whatever ; and the payment of every penalty or forfeiture, together with the reasonable expense incurred in recovering the same, may be enforced by monition and sequestration ; and the bishop can, by any order made for that purpose in writing under his hand, and to be registered in the registry of the diocese, direct that every such penalty or forfeiture so recovered, and which shall not have been remitted in whole or in part, or so much thereof as shall not have been remitted, shall be applied towards the augmentation or improvement of such benefice, or of the house of residence thereof, or of any of the buildings or appurtenances thereof. (1)

Stat. 1 & 2
Vict. c. 106.
s. 115.
Recovery of
fees, &c.

By stat. 1 & 2 Vict. c. 106. s. 115. all fees, charges, costs, and expenses incurred or directed to be paid by any spiritual person holding any benefice under the provisions of the act, which shall remain unpaid for the period of twenty-one days after demand thereof in writing, delivered to or left at the usual or last place of abode of such spiritual person, may be recovered by monition and sequestration ; but the person of whom any such

(1) *Court of the bishop* :—In *West (Clerk) v. Turner (Clerk)* (6 A. & E. 614.) it was held, that stat. 57 Geo. 3. c. 99. s. 74. entirely ousted the common law courts of jurisdiction in disputes touching any stipend appointed by the bishop to a curate under that act, or the payment of arrears of such salary.

And therefore, in assumpsit by a curate against a rector for such stipend, a plea founded on the statute is properly pleaded in bar, not in abatement.

And a special plea, founded on the statute, is sufficient if it allege, that disputes have arisen and are depending touching the stipend, and the payment thereof, and of the arrears thereof, and that the action is brought concerning the stipend and the payment thereof, and of the arrears thereof, touching which the disputes have arisen, within the meaning of the statute, not further specifying the subjects of dispute.

fees, charges, and expenses shall be so demanded can apply to the bishop of the diocese to order the taxation thereof, and the bishop must thereupon order some proper person to tax and settle the same; and the certificate of allowance, by the person so to be appointed, of such fees, costs, charges, and expenses so to be taxed, will be final.

PENALTIES
AND EFFECT
NON-RESI-
DENCE.

By stat. 1 & 2 Vict. c. 106. s. 117. all penalties and forfeitures under the act incurred by persons not spiritual, or by spiritual persons not holding benefices, can be sued for and recovered by any person by action of debt in any of her Majesty's Courts of Record at Westminster.

Stat. 1 & 2
Vict. c. 106
ss. 117, 119
118.

Recovery of
application
penalties.

By stat. 1 & 2 Vict. c. 106. s. 119. all penalties recovered under the provisions of the act, the application of which is not specially directed thereby, are to be paid over to the treasurer of the governors of the Bounty of Queen Anne, and to be applied to the purposes of that bounty.

By stat. 1 & 2 Vict. c. 106. s. 118. no penalty is to be recovered against any spiritual person, under the provisions of the act, other or further than those which such spiritual person may have incurred subsequent to the first day of January, in the year immediately preceding the year in which such proceedings shall be commenced.

RESIGNATION. (1)

DEFINED — *By what words a resignation can be made — Must be absolute and not conditional — Where the resignation is made causâ permutationis only — How the resignation must be made — To whom it must be made — Donatives not resignable to the ordinary — No resignation can be valid till accepted by the proper ordinary — Canon law supposes the power to be absolutely in the ordinary — Ordinary may accept or refuse a resignation — Ordinary is a judicial officer, and can accept or refuse a resignation — STATUTES RELATING TO ENGAGEMENTS TO RESIGN — Stat. 31 Eliz. c. 6. s. 8. — Stat. 7 & 8 Geo. 4. c. 25. — Engagements entered into for the resignation of any benefice upon notice or request to be valid — If entered into before presentation — And if such persons be within certain degrees of relationship to the patron — Persons making certain agreements not to be liable to penalties — Deed to be deposited with the registrar of the diocese — Deed to be open to inspection, and a certified copy to be admitted as evidence — Fees to registrar — Stat. 9 Geo. 4. c. 94. — Resignation to state the engagement and name of person for whom made — Resignation to be void, unless the person be presented within six months — Act does not extend to presentations made by the crown, &c. — From what time after resignation lapse will incur — PRACTICAL DIRECTIONS.*

A resignation is, where a parson, vicar, or other beneficed clergyman, voluntarily gives up and surrenders his charge and preferment to those from whom he received the same. (2)

DEFINED.

That a church may be voided by resignation, the instrument of resignation must be duly made. The word resignare is not good; for resignare is not in law a term of resignation; but renunciare, cedere, demittere are the usual terms. But where a prebendary gave, granted, rendered, and confirmed to the ordinary, Totam præbendam suam de C. ac omnia maneria, terras, tenementa, proficua, possessiones, jura, et hæreditamenta quæcunque tam

By what words
a resignation
can be made.

(1) *Vide* tit. DEPRIVATION — LAPSE — SIMONY.

(2) Degge's P. C. by Ellis, 248.

RESIGNATION.

spiritualia quam temporalia, ac omnem et omnimodam plenam et liberam facultatem, dispositionem, auctoritatem et potestatem dictæ præbendæ pertinentem, spectantem, appendentem sive incumbentem, aut ut parcell', &c. habend' et tenend' to him the ordinary and his successors in fee; and after the habendum states, Cui in hac parte ad omnem juris effectum qui exinde sequi poterit aut potest dictæ præbendæ, ac omnia jura mihi ratione ejusdem qualitercunque acquisita ut decet subjicio et submitto, &c. It was held, that these words were sufficient, and amounted to a resignation, although the more proper words were not used. (1)

Must be absolute and not conditional.

A collateral condition cannot be annexed to the resignation, no more than an ordinary can admit upon condition, or a judgment be confessed upon condition, which are judicial acts. (2)

For the words of resignation have always been purè, spontè, absolutè, et simpliciter, to exclude all indirect bargains, not only for money, but for other considerations. And therefore in *Gayton's case* (3), where the resignation was to the use of two persons therein named, and further limited with this condition, that if one of the two was not admitted to the benefice resigned within six months, the resignation should be void and of none effect; such resignation, by reason of the condition, was declared to be absolutely void. (4)

Where the resignation is made, causâ permutationis only.

But where the resignation is made causâ permutationis only, there it admits of this condition, viz. if the exchange shall take full effect, and not otherwise, as appears by the form of resignation which is in the register. (5)

If two parsons obtain a licence from the ordinary to exchange their benefices, the exchange to be valid, must be fully executed by both parties during their lives. (6)

A constitution of Othobon, after reciting, that "sometimes a man resigneth his benefice that he may obtain a vacant see, and bargaineth with the collator, that if he be not elected to the bishopric, he shall have his benefices again," decreed—"that, they shall not be restored to him, but shall be conferred upon others, as lawfully void; and if they be restored to him, the same shall be of no effect; and he who shall so restore him, after they have been resigned into his hands, or shall institute the resigner into them again, if he is a bishop he shall be suspended from the use of his dalmatic and pontificals, and if he is an inferior prelate he shall be suspended from his office, until he shall think fit to revoke the same." (7)

How the resignation must be made.

Regularly, resignation must be made in person, and not by proxy. There is, however, a writ in the register entitled, *Litera procuratoria ad resignandum*, by which the person constituted proctor was enabled to do all things necessary to be done, in order to an exchange; and of these things, resignation was one. And Lyndwood (8) supposes that any resignation may be made per procuratorem: but the doctrine of the reformatio legum, is,

(1) Watson's Clergyman's Law, 27, 28.

(2) Ibid. 28.

(3) Owen, 12.

(4) Godolphin's Repertorium, 277. Gibson's Codex, 821. 1 Stilling. Ca. 334.

(5) Gibson's Codex, 821.

(6) Vide Reg. f. 306. B. *Le Signior*

Cromwell's case, 2 Co. 74. (b). *Colt & Glover v. Coventry & Lichfield (Bishop of)*, Hob. 152. *Eton College (Provost of) v. Winchester (Bishop of)*, 3 Wils. 495.

(7) Athon, 134. 3 Burn's E. L. 542.

(8) Prov. Const. Ang. 107. Gibson's Codex, 822.

Ut omnia prorsus in hoc negotio sincera sint, procuratores excludimus, nec eos ullo modo patimur ad sacerdotiorum dimissionem admitti. (1)

But in practice there is no way (2) (as it seems) of resigning, but either to do it by personal appearance before the ordinary, or at least to do it elsewhere before a public notary, by an instrument directed immediately to the ordinary, and attested by the notary, in order to be presented to the ordinary by such proper hand as may pray his acceptance. In which case, the person presenting the instrument to the ordinary does not resign nomine procuratorio, as proctors do, but only presents the resignation of the person already made. (3)

In *Heyes v. Exeter College, Oxford* (4), the defendant Vye, by an instrument in the usual form, attested by a notary public, and directed to the Bishop of Exeter, expressed his resignation of the vicarage of Merthoe, in the county of Devon, and two other notaries public were constituted by him as his proctors to exhibit the same to the bishop. The instrument was sent by the post to the bishop, who merely indorsed it, and signed a memorandum of his acceptance of the resignation, which was held to be sufficient, though no public act.

That a resignation may take its effect, it must not only be absolute, but also made to a proper person.

The ordinary who has the power of institution, has power also to accept of a resignation made of the same church to which he may institute; and therefore, the respective bishop, or other person, who, either by patent under him, or by privilege or prescription, has the power of institution, are the proper persons to whom a resignation ought to be made. (5)

To whom it must be made.

But a resignation of a deanery in the king's gift may be made to the king, as of the deanery of Wells; and some have held that the resignation of a prebend that had no donative might be made to the king; but others, on the contrary, have held, that a resignation of a prebend ought to be made only to the ordinary of the diocese, and not to the king, as supreme ordinary, because the king is not bound to give notice to the patron (as the ordinary is) of the resignation; nor can the king make a collation by himself without presenting to the bishop, notwithstanding his supremacy. (6)

A resignation can only be made to a superior. This is a maxim in the temporal law, and is applied by Lord Coke to the ecclesiastical law, when he says, that therefore a bishop cannot resign to the dean and chapter (7); but it must be to the metropolitan from whom he received confirmation and consecration. (8)

And it must be made to the next immediate superior, and not to the mediate: as of a church presentative to the bishop and not to the metropolitan. (9)

(1) Ref. Leg. 34. (b).

(2) *Vide post*, 1228 in not.

(3) Gibson's Codex, 822. Degge's P. C. by Ellis, 248. Watson's Clergyman's Law, 22, 29.

(4) 12 Ves. 336

(5) "Ad eum fieri debet renunciatio ad quem spectat confirmatio." Inst. J. C. l. 19.

(6) 2 Rol. Abr. *Presentment* (F), 358.

pl. 2. Watson's Clergyman's Law, 29.

The necessity of resigning to the bishop

in ordinary cases is thus expressed in the canon law. Hi præterea qui beneficium ecclesiasticum sibi collatum sponte in manum laicam resignantes, illud de novo à laico susceperunt, eodem sunt beneficio spoliandi, licet, resignatio talium facta laico nullam obtineat firmitatem. Extra. l. 1. t. 9. c. 8.

(7) *Anon* 1 Rol. 137.

(8) Gibson's Codex, 822

(9) 2 Rol. Abr. *Presentment* (F), 358. pl. 1.

RESIGNATION.¹

Donatives not resignable to the ordinary.

No resignation can be valid till accepted by the proper ordinary.

Canon law supposes the power to be absolutely in the ordinary.

Ordinary may accept or refuse a resignation.

Donatives, however, are not resignable to the ordinary, but to the patron who has power to admit. (1)

And if there be two patrons of a donative, and the incumbent resign to one of them, it is good for the whole. (2)

No resignation can be valid till accepted by the proper ordinary; that is, no person appointed to a cure of souls can quit that cure, or discharge himself of it, but upon good motives, to be approved by the superior who committed it to him, for it may be, he would quit it for money, or to live idly, or the like. In fact it is the law temporal as well as spiritual, that all presentations made to benefices resigned, before such acceptance, are void. And there is no pretence to say, that the ordinary is obliged to accept, since the law has appointed no remedy, if he will not accept, any more than if he will not ordain. (3)

The canon law (4) supposes the power to be absolutely in the ordinary: *Universis personis tui episcopatus sub districtione prohibeas, ne ecclesie tue diocesis, ad ordinationem tuam pertinentes, absque assensu tuo intrare audeant, aut detinere, aut te dimittere inconsulto. Quod si quis contra prohibitionem tuam venire præsumpserit, in eum canonicam executionem.*

Lyndwood (5) makes a distinction in this case between a cure of souls, and a sinecure as follows: *Circa præmissa tamen puto distinguendum, inter eum, qui resignat beneficium simplex, tale viz. quod non habet curam animarum, et eum, qui resignat beneficium curatum, ut, videlicet, in primo casu cum ejus solius intersit, statim in ejus præjudicium teneat resignatio, etiam absque consensu superioris; secus tamen ubi imminet cura animarum quia jam non solum ejus interest, sed etiam aliorum, quibus tenetur prædicare; unde in hoc casu necessaria est ratihabitio episcopi, vel ipsius, qui potest de jure vel consuetudine talem resignationem admittere.*

In *Rockingham (Marchioness of) v. Griffith* (6), Dr. Griffith being possessed of the two rectories of Leythley and Thurnsco, in order that he might be capacitated to accept another living which became vacant, to wit, the rectory of Handsworth, executed an instrument of resignation of the rectory of Leythley before a notary public, which was tendered to and left with the Archbishop of York, the ordinary of the place within which Leythley is situate. It was objected, that this did not appear to have been any acceptance of the resignation by the archbishop, and that without his acceptance the rectory of Leythley could not become void. The lord chancellor held that the ordinary's acceptance of the resignation was absolutely necessary to make an avoidance; but whether in this case there was a proper resignation and acceptance thereof, he reserved for further consideration; and in the mean time recommended it to the archbishop to produce the resignation in court. Afterwards, on the 17th of April, 1755, the cause came on again to be heard, and the resignation was then produced, but the counsel for the executors of the late marquis declaring that they did not intend to make any further opposition, the lord chancellor gave no opinion upon the resignation, or the effect of it; but in the course of the former argument he held,

(1) Gibson's Codex, 822.

(2) Degge's P. C. by Ellis, 249.

(3) Gibson's Codex, 822. 1 Stilling. Ca. 334.

(4) Extra. l. i. t. 9. c. 4.

(5) Prov. Const. Ang. 107.

(6) 3 Burn's E. L. 543. 7 Bac. Ab. Simony (D), 246.

that the acceptance of a resignation by the ordinary was necessary to make it effectual, and that it is in the power of the ordinary to accept or refuse a resignation.

In *Hesket v. Grey* (1), where a general bond of resignation was put in suit, and the defendant pleaded, that he offered to resign, but the ordinary would not accept the resignation, the Court of King's Bench were unanimously of opinion, that the ordinary is a judicial officer, and is intrusted with a judicial power to accept or refuse a resignation as he thinks proper, and judgment was given for the plaintiff. (2)

Formerly, the bishop in cases of resignation might and did frequently assign a pension during life out of the benefice resigned to the persons resigning; but by stat. 31 Eliz. c. 6. s. 8., if any incumbent of any benefice with cure of souls corruptly resign or exchange the same, or corruptly take for or in respect of resigning or exchanging the same, directly or indirectly, any pension, sum of money, or benefit whatsoever, the giver and the taker are in a *qui tam* action to lose double the value of the sum so given, taken, or had; and double the value of one year's profit of the benefice is to be forfeited to the queen.

The statutes relating to engagements to resign are stat. 7 & 8 Geo. 4. c. 25. (3) and stat. 9 Geo. 4. c. 94. (4)

It having been held in *Fletcher (Clerk) v. Soudes (Lord)* (5) that all bonds for resignation, special as well as general, were simoniacal and illegal, caused the enactment of stat. 7 & 8 Geo. 4. c. 25., which after reciting that spiritual persons and patrons, and other persons, would suffer great hardship and detriment, unless they be relieved from the penalties to which they had, by acting erroneously but not wilfully, rendered themselves liable,—enacted, that no presentation to any spiritual person, &c. before the 9th of April, 1827, nor any admission, institution, investiture or induction thereon, should be void by reason of any engagement entered into by such spiritual person, or any other person or persons, to or with the patron of a spiritual office, for the resignation of the same, to the intent manifested by the terms of such engagement, that some person, or one of two persons, specially named or described therein, should be presented, collated, or nominated to such spiritual office, or that the same should be given to him, or for the resignation thereof, upon notice or request or otherwise, when a person, or one of two persons, so specially named or described, should become qualified by age or otherwise to take the same; and that the parties thereto should not be liable to penalties:—And by sect. 4., where any spiritual office is resigned pursuant to any such engagement, and the person, or one of the two persons so specially named or described therein, shall not be presented, &c. within six calendar months next after such resignation, the resignation will be void, and the spiritual person so resigning

RESIGNATION.

The ordinary is a judicial officer and can accept or refuse a resignation.

STATUTES RELATING TO ENGAGEMENTS TO RESIGN.
Stat. 31 Eliz. c. 6 s. 8.
Corrupt resignation.

Stat. 7 & 8 Geo. 4. c. 25.

(1) Cit. 3 Burn's E. L. 543.

(2) *Vinle London (Bishop of) v. Ffytche*, error, 1 East, 487. 3 Burn's E. L. 544.

It seems under stat. 7 & 2 Vict. c. 106. a clergyman desirous of resigning, can do so exclusive of the bishop, viz. by procuring presentation and institution to another living, however trifling in value, contrary to that statute, or which cannot, under the

provisions of that statute, be tenable with the benefice previously held, then such former benefice, which he may have wished to resign, will be and become *ipso facto* void.

(3) Stephens' Ecclesiastical Statutes, 1358.

(4) *Ibid.* 1400.

(5) 3 Bing. 501.

RESIGNATION.

Stat. 9 Geo. 4. c. 94. ss. 1—4. Engagements entered into for the resignation of any benefice upon notice or request to be valid.

If entered into before the presentation.

And if such persons be within certain degrees of relationship to the patron.

Persons making certain agreements not to be liable to penalties.

Deed to be deposited with the registrar of the diocese.

Deed to be open to inspection, and a certified copy to be admitted as evidence.

will, without any act or form, unless disqualified to hold the same, be deemed to have continued the incumbent actually in possession, notwithstanding such resignation, and although within the six months some other person may have been presented, &c. thereto.

By stat. 9 Geo. 4. c. 94. s. 1. every engagement by promise, grant, agreement, or covenant, which shall be really and *bona fide* made, for the resignation of any spiritual office, being a benefice with cure of souls, dignity, prebend, or living ecclesiastical, to the intent or purpose, to be manifested by the terms of such engagement, that any one person whosoever, to be specially named and described therein, or one of two persons to be specially named and described therein, being such [as are within certain degrees of relationship] (1), shall be presented, &c. to such spiritual office, or that the same shall be given to him, will be valid, and its performance may be enforced in equity; provided that such engagement shall be so entered into before the presentation, &c. of the party so entering into the same.

By stat. 9 Geo. 4. c. 94. s. 2. when two persons shall be so specially named each of them must be either by blood or marriage, an uncle, son, grandson, brother, nephew, or grand nephew of the patron, or of one of the patrons of such spiritual office, not being merely a trustee or trustees of the patronage of the same, or of the person, or of one of the persons for whom the patron or patrons shall be a trustee or trustees, or of the person, or of one of the persons by whose direction such presentation, &c. shall be intended to be made, or of any married woman whose husband, in her right, shall be the patron or one of the patrons of such spiritual office, or of any other person in whose right such presentation, &c. shall be intended to be made.

By stat. 9 Geo. 4. c. 94. s. 3. no *presentation* (2), &c., nor any admission, &c., will be void by reason of such engagement by any spiritual persons or others, to or with patrons or others, and the crown cannot present or collate, or give or bestow such spiritual office, in consequence thereof; and such spiritual persons or patrons will not be subject to any penalties or forfeitures, or to any prosecution or other proceeding, from having made such engagement.

By stat. 9 Geo. 4. c. 94. s. 4., in order to bring any engagement within the operation and protection of the act, one part of the deed, instrument, or writing, by which such engagement shall be made, given, or entered into, must within two calendar months next after the date thereof be deposited in the office of the registrar of the diocese wherein the benefice, &c. is locally situate; and in the cases of benefices, &c. within peculiar, it is to be deposited with the registrar of the peculiar jurisdiction. Such registrars are respectively to deposit and preserve the same, and to give and sign a certificate of such deposit. Every such deed must be produced at all proper and usual hours at the registry office, to every person applying to inspect the same. And an office copy thereof, &c., certified under the

(1) *Vide* stat. 9 Geo. 4. c. 92. s. 2.

(2) Where a party was presented to a rectory in consideration of his having given a bond to resign in favour of a particular person, at the request of the patron, and was instituted and inducted, and such bond was held to be void, on the ground that it was simoniacal, and the king then presented A.

B., and he was instituted and inducted: it was held, previous to the passing of stat. 9 Geo. 4. c. 94. that he might maintain ejectment for the rectory against the person who had been simoniacally presented. *Doe d. Watson (Clerk) v. Fletcher (Clerk)*, 8 B. & C. 25.

hand of the registrar (which copy so certified the registrar must in all cases grant to persons applying for the same), will be admitted in all courts as legal evidence. Every registrar is entitled to a fee of two shillings for depositing such deed, instrument, or writing, and for certifying its deposit, to a fee of one shilling for every search to be made for the same, and to a fee of sixpence for every folio of seventy-two words of each certified office copy.

By stat. 9 Geo. 4. c. 94. s. 5. every resignation to be made in pursuance of any such agreement is to refer to the engagement in pursuance of which it is made, and state the name of the person for whose benefit it is made; and the ordinary cannot refuse such resignation, unless upon good and sufficient cause to be shown for that purpose. But such resignation will not be valid, except for the purpose of allowing the person for whose benefit it shall be made, to be presented, collated, nominated, or appointed to the spiritual office thereby resigned, and will be absolutely null and void, unless such person be presented, &c. as aforesaid, within six calendar months next after notice of the resignation, given to the patron.

By stat. 9 Geo. 4. c. 94. s. 6. all presentations, collations, gifts, or the bestowing of any such spiritual office by the king, either in the right of the crown or duchy of Lancaster; or by archbishops, bishops, or other ecclesiastical persons, in right of any dignity, office, or living; or by corporations aggregate or sole; or by any other person in right of any office or dignity; or by feoffees or trustees for charitable or public purposes; or by any other person not entitled to the patronage of such spiritual office, as private property, are excepted from the operation of the act.

Any bond or contract to resign, except in the cases specified in the act, makes the presentation void as simoniacal, and subjects the parties to the penalties for simony, under stat. 31 Eliz. c. 6. But a clergyman can resign his living in consequence of an understanding or agreement, not compulsory, with the patron, provided the bishop be willing to accept the resignation; or the resignation might perhaps be effected by institution to a second living. (1)

After acceptance of the resignation, lapse does not incur, but from the time of notice given. It is true the church is void, immediately upon acceptance, and the patron may present, if he please; but as to lapse, the general rule that is here laid down, is the unanimous doctrine of all the books. Inasmuch, that if the bishop who accepted the resignation dies before notice given, the six months will not commence till notice be given by the guardian of

RESIGNATION.

Fees to registrar.

Stat. 9 Geo. 4. c. 94. ss. 5 & 6. Resignation to state the engagement and name of person for whom made.

Resignation to be void, unless the person be presented within six months.

Act does not extend to presentations made by the crown, &c.

From what time after resignation lapse will incur.

(1) Mr. Hodgson, in his Instructions to the Clergy (p. 40.), gives the following practical directions for the proper resignation of a benefice:—

"A clergyman desirous to resign preferment must state the reasons which induce him to do so to the bishop, and if the latter agrees to accept the resignation, the proper instrument is to be prepared by the bishop's secretary or other officer, to be executed by the incumbent in the presence of a notary public and credible witnesses; and if such resignation cannot conveniently be tendered by the incumbent in person, to the

bishop, proctors or substitutes may be named in the deed of resignation, for them, or one of them, in the name of the incumbent, to exhibit such resignation to the bishop, who, upon the same being exhibited by the incumbent or his proctor, will declare his acceptance thereof and will order that intimation of the avoidance of the benefice (if not in the bishop's own gift) be given to the patron.

"The proper stamp for a resignation is the common deed stamp; and the attestation by the notary requires a 5s. stamp."

RESIGNATION.

the spiritualities, or by the succeeding bishop, with whom the act of resignation is presumed to remain. (1)

SACRILEGE.

Stat. 23 Hen. 8. c. 1. & stat. 1 Edw. 6. c. 12. repealed by stat. 7 & 8 Geo. 4. c. 27. — Stat. 5 & 6 Gul. 4. c. 81. & stat. 6 & 7 Gul. 4. c. 4. abolishing capital punishment in cases of sacrilege — Stat. 6 & 7 Vict. c. 10. — Stat. 5 & 6 Vict. c. 38. s. 1. — Offence of sacrilege not triable at sessions — The word “chattel” in stat. 5 & 6 Gul. 4. c. 81. does not include any thing affixed to the freehold — “Any chattel” would probably extend to articles not used for divine service — A “tower” is part of the church — Definition of the word “chapel” — Mode of describing church property in an indictment.

Stat. 23 Hen. 8. c. 1. & stat. 1. Edw. 6. c. 12. repealed by stat. 7 & 8 Geo. 4. c. 27.

Stat. 7 & 8 Geo. 4. c. 27. repealed stat. 23 Hen. 8. c. 1. & stat. 1 Edw. 6. c. 12., which applied to sacrilege; and a larceny, committed in a church or chapel, accompanied with a breaking of such church or chapel, is no longer a capital offence; and the provisions of stat. 1 Edw. 6. c. 12., which made the felonious taking of any goods out of a church or chapel a capital offence, though there was no breaking, have not been re-enacted.

Stat. 5 & 6 Gul. 4. c. 81. Abolishing capital punishment in cases of sacrilege.

Stat. 5 & 6 Gul. 4. c. 81., after reciting that by stat. 7 & 8 Geo. 4. c. 29. (2), & stat. 9 Geo. 4. c. 55. (1.), “it was thereby enacted, that if any person break and enter any church or chapel, and steal therein any chattel, or having stolen any chattel in any church or chapel, break out of the same, every such offender, being convicted thereof, is to suffer death as a felon,” repealed so much of such acts as inflicted the punishment of death upon persons convicted of sacrilege; and enacted that every person convicted of that offence, “or of aiding or abetting, counselling, or procuring the commission thereof, shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years.”

Stat. 6 & 7 Gul. 4. c. 4.

Stat. 6 & 7 Gul. 4. c. 4., after reciting stat. 5 & 6 Gul. 4. c. 81., and that “by reason of a clerical error in copying the same a doubt may be entertained, whether persons guilty of such offences are now by law liable to any punishment,” enacts that “the same act shall be read as if, instead of the words ‘in the said act so specified,’ the words ‘in the said acts so specified’ had been inserted;” and that all persons who may hereafter be duly convicted of any of the offences therein mentioned may be sentenced, by the court or judge by or before whom such offenders may be tried, to transportation for life, or for any term of years not less than seven, or to be imprisoned for any term not exceeding three years, with or without hard labour, and for any period of solitary confinement during such imprisonment, at the discretion of such court or judge. But by stat. 1 Vict.

(1) Gibson's Codex, 823. Keilw. 49. (b).

(2) *Idle* stat. 2 & 3 Gul. 4. c. 62., stat. 3 & 4 Gul. 4. c. 44., stat. 5 & 6 Gul. 4. c.

81., stat. 6 & 7 Gul. 4. c. 4., & stat. 7 Gul. 4. & 1 Vict. c. 90. s. 5. Stephens' Ecclesiastical Statutes, 1357.

c. 90. s. 5., no offender can be kept in solitary confinement for any longer period than one month at a time, or than three months in the space of one year.

By stat. 6 & 7 Vict. c. 10., after reciting that by stat. 4 & 5 Vict. c. 56. and stat. 7 & 8 Geo. 4. c. 90. if any persons, riotously and tumultuously assembled together to the disturbance of the public peace, should unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy any church or chapel, or any chapel for the religious worship of persons dissenting from the united Church of England and Ireland, duly registered or recorded... every such offender should be deemed guilty of felony, and being convicted thereof should suffer death as a felon; and that in case of every felony punishable under that act, every principal in the second degree, and every accessory before the fact, should be punishable with death or otherwise, in the same manner as the principal in the first degree was by that act punishable; and that it was expedient that the last mentioned offences should be no longer punishable with death; — enacts, that if any person shall be convicted of any of the said offences, such person shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any time not exceeding three years.

By stat. 5 & 6 Vict. c. 38. s. 1. the offence of sacrilege is not triable at any quarter sessions.

The word "chattel" in stat. 5 & 6 Gul. 4. c. 81. does not include any thing affixed to the freehold. Thus, upon an indictment for breaking into a chapel, and stealing a bell and divers other articles, it appeared that the bell was the only thing not fixed in the chapel; and it was held, that the case must be confined to the stealing of the bell; for, although the same statute by the 44th section enacted, that stealing fixtures might be the subject of larceny, yet it did not say that fixtures should be considered as chattels, which they must be, to bring them within the section, upon which that indictment was founded. (1)

The words "any chattel" would probably be deemed to extend to articles in a church or chapel, though not used for divine service. The words "any goods," in the repealed statute 1 Edw. 6. c. 12., were held not to be confined to goods used for divine service, but to extend to articles used in the church to keep it in proper order; and it was considered, that such articles were under the protection of the statute, whilst the church was in a course of being repaired, if they had not been brought in merely for the purpose of such repairs. In *Rex v. Bourke* (2) it appeared that, during the period a church was under repairs, the prisoner stole from it a pot used to hold charcoal for airing the vaults, and a snatch-block, used to raise weights, if the bells wanted repair. These articles had been kept in the church for years, and were not brought in for the repairs which were then in progress. Upon a case reserved, the judges were unanimous that such goods were under the protection of the statute, and that a capital sentence ought to be passed upon the prisoner, as they thought that the violation of the sanctity of the place was what the statute was intended to prevent. (2)

(1) *Rex v. Nixon*, 7 C. & P. 442.

(2) R. & R. 386.

SACRILEGE.

A tower is part of the church.

The tower of a parish church, having an internal communication with, and not being separated from, the body of the church, is a part of the church, within the meaning of stat. 7 & 8 Geo. 4. c. 29. Upon an indictment for breaking into a parish church, and stealing two surplices and a scarf, it appeared, that the surplices and scarf were stolen from a box kept in the church tower; the tower was built higher than the church, and had a separate roof, but it had no outer door, the only way of going into it being through the body of the church, from which the tower was not separated by a door or partition of any kind: it was objected, that the stealing of these articles deposited in the tower was not sacrilege; but it was held that a tower, circumstanced as this tower was, must be taken to be part of the church, and that the stealing of these articles in the tower was a stealing in the church within the meaning of stat. 7 & 8 Geo. 4. c. 29 s. 10. (1)

Definition of the word "chapel."

The word "chapel" in stat. 7 & 8 Geo. 4. c. 29. s. 10. means a chapel where the rites and ceremonies of the Church of England are performed, and does not include the chapels of Dissenters. Upon an indictment for breaking and entering a chapel, which, upon the evidence, turned out to be a dissenting chapel, Mr. Justice Gaselee and Mr. Baron Vaughan were of opinion, that as dissenting chapels were mentioned expressly in stat. 7 & 8 Geo. 4. c. 30., which makes the burning of churches, &c. a capital offence, and were not mentioned in stat. 7 & 8 Geo. 4. c. 29. s. 10., which stands in the statute book, as the chapter next preceding it, the omission must have been intentional, and consequently that a dissenting chapel was not within stat. 7 & 8 Geo. 4. c. 29. s. 10. (2)

Mode of describing church property in an indictment.

The goods of a dissenting chapel, vested in trustees, cannot be described as the goods of a servant, who has merely the care of the chapel and the things in it, to clean and keep them in order, although he and the minister may be the only persons who have keys. (3) But books belonging to a society of Dissenters, and stolen from their chapel, may be described as the property of one of the members of the society by name "and others." Upon an indictment for stealing a bible and hymn book, the property of J. Bennett and others, it appeared that the books had been presented to the society of Wesleyan Methodists, from whose chapel they had been stolen, and they had been bound at the expense of the society; Bennett was one of the trustees of the chapel, and a member of the society, but no trust deed was produced; it was held, that as Bennett was one of the society, the property in the books was well laid in him "and others." (4)

It has been held that where the bells, books, or other goods belonging to a church are stolen, they may be laid in the indictment to be the goods of the parishioners. (5) And it is said, that he who takes away the goods of a chapel or abbey, in time of vacation, may be indicted, in the first case, for stealing bona capellæ, being in the custody of such and such persons; and, in the second, for stealing bona domûs et ecclesiæ, &c. (6)

Where money was stolen from an ancient poor's box fixed up in a church

(1) <i>Rex v. Wheeler</i> , 3 C. & P. 585.	(4) <i>Rex v. Boulton</i> , 5 C. & P. 537.
(2) <i>Rex v. Warren</i> , 6 ibid. 335. n. (a); vide etiam <i>Rex v. Richardson</i> , ibid. 335.	(5) 1 Hawk. P. C. c. 33. s. 45. 2 East. P. C. c. 16. s. 69. p. 651.
<i>Rex v. Nixon</i> , 7 ibid. 442.	(6) Ibid. 1 Russell on Crimes, by Greaves, 845.
(3) <i>Rex v. Hutchinson</i> , R. & R. 412.	

it was held, that in an indictment for stealing it, the property would be properly laid in the vicar and churchwardens; and that an indictment in which the property was stated to be that of "Joshua Nussey and others," Joshua Nussey being the vicar, was correct, without alleging "Joshua Nussey" to be the vicar, or the "others" to be the churchwardens. (1)

SACRILEGE.

SALES BY INCUMBENTS. (2)

Stat. 1 & 2 Vict. c. 23. s. 7. — House of residence and appurtenances, when inconveniently situated, may be sold with the land contiguous thereto — Stat. 1 & 2 Vict. c. 23. ss. 8 & 9. — Payment of purchase money and application of it in the purchase of a site, or erection of a house — Stat. 1 & 2 Vict. c. 106. s. 25. — Sale of houses on the disunion of an united benefice — Stat. 2 & 3 Vict. c. 49. ss. 14, 17, 18, & 19. — Powers to lay out purchase money at interest — Sale of houses and buildings other than the house of residence — Purchase monies to be paid to the governors of Queen Anne's Bounty — Stat. 17 Geo. 3. c. 53. ss. 10 & 11. — Glebe lands or tithes may be sold for purchasing house or land within one mile of the church — Stat. 2 & 3 Vict. c. 49. ss. 15, 16, 18, & 19. — Lands acquired from Queen Anne's Bounty may be sold — Power to sell lands annexed to a benefice within the parish — Stat. 58 Geo. 3. c. 45. ss. 33. & 36. — Sale of lands to Church Building Commissioners for church sites — Stat. 59 Geo. 3. c. 134. s. 37. — Stat. 56 Geo. 3. c. 141. ss. 1 & 2. — Sale of land for a new or additional burial ground to any new church — Land for a new or additional burying ground — Stat. 1 & 2 Vict. c. 107. s. 9. — Land to Church Building Commissioners for sites for houses of residence — Stat. 7 Geo. 4. c. 66. s. 1. — Lands, &c. may be sold to carry into effect stats. 17 Geo. 3. c. 53., 43 Geo. 3. c. 107., and 55 Geo. 3. c. 147. — Stat. 9 & 10 Vict. c. 88. — Removing doubts as to the legality of certain sales and assignments of ecclesiastical patronage.

By stat. 1 & 2 Vict. c. 23. s. 7. (3) and stat. 1 & 2 Vict. c. 29., if the residence house and appurtenances be inconveniently situate, or if it be fit and advisable to dispose thereof, the incumbent may, with the consent of the ordinary and patron, and of the archbishop of the province, to be signified by their executing the deed of conveyance, absolutely sell and dispose of the same, with any land contiguous thereto, not exceeding twelve acres, to any person, either altogether or in parcels, for such sum of money as to such ordinary, patron, and archbishop shall appear fair.

By stat. 1 & 2 Vict. c. 23. ss. 8 & 9. the money to arise from such sale is to be paid to the governors of Queen Anne's Bounty, and the receipt of the treasurer will be a discharge for the payment. (4) And such money, after paying the costs and expenses of the sale, is to be applied towards the erection or purchase of some other house and offices, or the purchase of an orchard, garden, and appurtenances, or land for the site of a house, together with land contiguous thereto, but not exceeding twelve acres, suitable for the residence of the incumbent, and approved of by the ordinary

Stat. 1 & 2 Vict. c. 23. s. 7. House of residence and appurtenances, when inconveniently situated, may be sold, with the land contiguous thereto.

Stat. 1 & 2 Vict. c. 23. ss. 8 & 9. Payment of purchase money and application of it in the purchase of a site, or erection of a house.

(1) *Reg. v. Wortley*, 2 C. & K. 283.

(2) *Vide ante*, tit. AUGMENTATIONS — CHURCH BUILDING STATUTES — EXCHANGE — MORTGAGES — PURCHASES — RESIDENCE.

(3) Extended by stat. 2 & 3. Vict. c. 49. s. 17. to old buildings not worth repairing; *vide post*, 1236.

(4) *Et vide* stat. 2 & 3 Vict. c. 49. s. 18.

SALES BY INCUMBENTS.

Stat. 1 & 2 Vict.
c. 106. s. 25.
Sale of houses
on the disunion
of an united
benefice.

and patron, but such approval must be in writing, and be deposited in the registry of the ordinary.

By stat. 1 & 2 Vict. c. 106. s. 25. the enactments of stat. 1 & 2 Vict. c. 23., in regard to the sale of the house, &c. of a living and the application of the proceeds of the sale, are to apply to a benefice divided or separately endowed under the Church Building Acts and a benefice disunited under stat. 1 & 2 Vict. c. 106., and that the proceeds may be applied in or towards the erection or purchase of a house, &c. for the residence of an incumbent within each of the parishes so disunited, or each division of a benefice so divided, in such proportions as may be approved of by the archbishop of the province, the patron, ordinary, and incumbent, and confirmed by the queen in council.

Stat. 2 & 3 Vict.
c. 49. s. 14.
Powers to lay
out purchase
money at in-
terest.

By stat. 2 & 3 Vict. c. 49. s. 14. a power is given to the governors to lay out the purchase money upon interest, and receive the dividends thereupon, till the purchase or erection of the benefice house, and to appropriate the surplus, if any, to the benefice on account of which the monies shall have been received.

Stat. 2 & 3 Vict.
c. 49. ss. 17,
18, 19.
Sale of houses
and buildings
other than the
house of resi-
dence.

By stat. 2 & 3 Vict. c. 49. s. 17. if any dwelling house, shop, warehouse, or other erection or building other than the house of residence belonging to any benefice be so old and ruinous as that it would be useless or inexpedient to expend money in repairing and maintaining it, or for other reasons it be thought advisable to sell the same, the incumbent of such benefice can, with the consent of the ordinary and patron thereof, and of the archbishop of the province to be signified in the manner prescribed by stat. 1 & 2 Vict. c. 23., absolutely sell and dispose of the same to any person, and for such sums of money as to such ordinary, patron, and archbishop shall appear fair and reasonable.

Purchase
monies to be
paid to the
governors of
Queen Anne's
Bounty.

And by ss. 18 & 19. the purchase monies are to be paid to the governors of the Bounty of Queen Anne, and to be by them appropriated to the particular benefice on account of which the same shall have been received; and to be subject, in regard to the application thereof, to all the powers, regulations, &c. of the governors.

Stat. 17 Geo. 3.
c. 53. ss. 10 &
11.
Glebe lands or
tithes may be
sold for pur-
chasing house
or land within
one mile of the
church.

By stat. 17 Geo. 3. c. 53. ss. 10 & 11., when new buildings are necessary for the residence of the incumbent, the ordinary, patron, and incumbent of a living may purchase any convenient house within one mile of the church, and a certain portion of land, and the purchase money for such land can be raised by sale of part of the glebe or tithes.

Stat. 2 & 3 Vict.
c. 49. ss. 15, 16.
18 & 19.
Lands acquired
from Queen
Anne's Bounty
may be sold.

By stat. 2 & 3 Vict. c. 49. s. 15., where any lands or hereditaments, which in consequence of any purchase, allotment, benefaction, donation, or exchange, shall have been annexed to any benefice for the augmentation thereof, by the concurrence of the governors of Queen Anne's Bounty, are situate elsewhere than within the parish of such benefice, or some adjoining parish, the incumbent of such benefice can, with the consent of the governors and of the ordinary and patron of such benefice, absolutely sell and dispose of such lands or hereditaments, or any part thereof, for such sums of money as to the governors, ordinary, and patron shall seem fair and reasonable.

Power to sell
lands annexed
to a benefice
within the

By stat. 2 & 3 Vict. c. 49. s. 16., when any lands or hereditaments have been annexed to any benefice, and situate within the parish of such benefice, or some adjoining parish, but, on account of special circumstances,

a sale of such lands or hereditaments will be advantageous, the incumbent, with the consent of the governors and of the ordinary, and patron of such benefice, with the further consent of the archbishop of the province in which such benefice is situated, can sell the same and in the same manner as is directed with respect to lands not situate within the parish.

By stat. 58 Geo. 3. c. 45. ss. 34. & 36. land to the extent of ten acres can be sold to the Church Building Commissioners for a site for a church or chapel and a churchyard, and proper approaches thereto, and also for the erection of a house of residence and appurtenances and the making a garden.

By stat. 59 Geo. 3. c. 134. s. 37. land to the extent of ten acres can be sold and conveyed to the commissioners for building new churches, for enlarging a churchyard or burial ground, or for making a new burial-ground and approaches; and the provisions of stat. 58 Geo. 3. c. 45. respecting a sale by an incumbent for the building of a church, are extended to such a sale and conveyance.

By stat. 56 Geo. 3. c. 141. ss. 1 & 2. any spiritual or ecclesiastical body corporate, or spiritual person being a corporation sole, possessing any land adjacent to any cemetery, churchyard, or burying ground, can sell by indenture of bargain and sale (but which must be enrolled in Chancery within six calendar months) such portion thereof as may be deemed necessary for enlarging the same, if it do not exceed one acre. But the consent of the ordinary and patron must be acquired to a sale by a spiritual person being a corporation sole; and, before the conveyance, the value of the land must be ascertained on oath by a competent person to be appointed by the ordinary; and in case the value exceed 100*l.*, other lands of at least an equal value, estimated in like manner, are to be conveyed as the consideration; and if the value exceed 20*l.*, and do not amount to 100*l.*, such value is to be paid to the governors of Queen Anne's Bounty, to be by them applied for the benefit of such spiritual person, or corporation sole, in the same manner as they are empowered by law to apply other sums of money coming into their hands; and if the value do not amount to 20*l.*, the same is to be paid to the spiritual person or corporation sole.

By stat. 1 & 2 Vict. c. 107. s. 9. the powers, given by stat. 58 Geo. 3. c. 45. for enabling the bodies politic and persons therein mentioned to convey, and the commissioners to take land for the sites of churches and chapels, are extended to the transfer by sale or exchange only, of land for a site for a house of residence of any incumbent, provided the same do not exceed five acres.

Messuages, buildings, or lands can be sold to carry into effect the provisions of stat. 17 Geo. 3. c. 53. (1), stat. 43 Geo. 3. c. 107. (2), and stat. 55 Geo. 3. c. 147. (3); and by stat. 7 Geo. 4. c. 66. s. 1. corporations and persons under disability or incapacity are authorised to sell messuages, lands, &c. for the purposes of the foregoing statutes.

Stat. 9 & 10 Vict. c. 88., after reciting that stat. 3 & 4 Vict. c. 113. had enacted that no spiritual person shall sell or assign any patronage or pre-

SALES BY INCUMBENTS.

Stat. 58 Geo. 3. c. 45. ss. 33. & 36.

Sale of land to Church Building Commissioners for church sites.

Stat. 59 Geo. 3. c. 134. s. 37. & stat. 56 Geo. 3. c. 141. ss. 1 & 2. Sale of land for a new or additional burial-ground to any new church.

Stat 1 & 2 Vict. c. 107. s. 9. Land to Church Building Commissioners for sites for houses of residence.

Lands, &c. may be sold to carry into effect sts. 17 Geo. 3. c. 53., 43 Geo. 3. c. 107. & 55 Geo. 3. c. 147.

Stat. 9 & 10. Vict. c. 88.

SALES BY INCUMBENTS.

Removing doubts as to the legality of certain sales and assignments of ecclesiastical patronage.

resentation belonging to him by virtue of any dignity or spiritual office held by him, and that such sale or assignment shall be null and void, and that doubts had arisen whether agreements for the augmentation of the maintenance of the poor clergy, or under the Church Building Acts, were to be deemed sales or assignments prohibited by stat. 3 & 4 Vict. c. 113., enacts that no agreement or other proceeding touching any advowson or patronage, or right of presentation or nomination of any spiritual person to any cure or benefice, donative, or perpetual curacy, or to serve any church or chapel under the Augmentation Acts, or Church Building Acts, shall be deemed a sale or assignment such as is prohibited by stat. 3 & 4 Vict. c. 113.

SCHOOL SITES.

Statutes respecting school sites — Stat. 4 & 5 Vict. c. 38. — Landlords empowered to convey land to be used as sites for schools. — Stat. 7 & 8 Vict. c. 37. s. 3. — Death of donor within twelve months not to avoid grant. — Stat. 4 & 5 Vict. c. 38. s. 6. — Ecclesiastical corporation below a bishop cannot convey land without the consent of the bishop of the diocese — Stat. 7 & 8 Vict. c. 37. ss. 4 & 5. — By whom sites may be granted to the minister and churchwardens; or to the minister, churchwardens, and overseers. — Stat. 4 & 5 Vict. c. 38. s. 8. — To whom estates vested in trustees for the purposes of education may be conveyed. — Stat. 7 & 8 Vict. c. 37. ss. 1 & 2. — Schools when liable to the visits of government inspectors.

Statutes respecting school sites.

Stat. 4 & 5 Vict. c. 38.

Landlords empowered to convey land to be used as sites for schools, &c.

The statutes respecting school sites are 4 & 5 Vict. c. 38. & 7 & 8 Vict. c. 37. (1)

Stat. 4 & 5 Vict. c. 38., after repealing stat. 6 & 7 Gul. 4. c. 70., enacts that any person being seised in fee simple, fee tail, or for life, of and in any manor or lands of freehold, copyhold, or customary tenure, and having the beneficial interest therein, or in Scotland being the proprietor in fee simple or under entail, and in possession for the time being, may grant, convey, or enfranchise, by way of gift, sale, or exchange, in fee simple or for a term of years, any quantity not exceeding one acre of such land, as a site for a school for the education of poor persons, or for the residence of the schoolmaster or schoolmistress, or otherwise for the education of such poor persons in religious and useful knowledge. But no such grant, made by any person seised only for life of and in any such manor or lands, will be valid, unless the person next entitled to the same in remainder, in fee simple or fee tail, be a party to and join in such grant.

Stat. 7 & 8 Vict. c. 37. s. 3.

Death of donor within twelve months.

Stat. 4 & 5 Vict. c. 38. s. 6.

When ecclesiastical corporations cannot convey land.

And by stat. 7 & 8 Vict. c. 37. s. 3. conveyances for school sites without any valuable consideration are, if otherwise lawful, rendered valid, although the grantor may die within twelve calendar months after the execution of the deed.

By stat. 4 & 5 Vict. c. 38. s. 6. no ecclesiastical corporation sole, being below the dignity of a bishop, can grant land for the purposes of school sites, without the consent in writing of the bishop of the diocese to whose jurisdiction such ecclesiastical corporation is subject.

(1) Stephens' Ecclesiastical Statutes, 2134—2140. 2229—2231.

By stat. 7 & 8 Vict. c. 37. s. 4. grants of land for school sites may be made to the minister and churchwardens of any parish, such minister being the rector, vicar, or perpetual curate thereof, whether endowed or not.

By stat. 7 & 8 Vict. c. 37. s. 5., if the rector, vicar, or perpetual curate of any parish be desirous of making a grant of any land for a school site, being part of the glebe or other possessions of his benefice, and shall with the consent of the patron of the benefice, and of the bishop of the diocese within which the same shall be situated, grant the same to the minister and church or chapelwardens, or to the minister, church or chapelwardens, and overseers of the poor of the parish, such grant shall be valid, and shall thenceforth enure for the purposes of the trust set forth therein if otherwise lawful, notwithstanding such minister be the party making the grant.

By stat. 4 & 5 Vict. c. 38. s. 8., after reciting that schools for the education of the poor in the principles of the Established Church, or in religious and useful knowledge, and that residences for the masters or mistresses of such schools had been theretofore erected, and were vested in trustees not having a corporate character, enacts — that the trustees for the time being of such last mentioned schools and residences, not being subject to the provisions of an act of parliament intituled “An Act for improving the conditions and extending the benefits of grammar schools,” may convey or assign the same, and all their estate and interest therein, to such ministers, and churchwardens, and overseers of the poor of the parish within which the same are respectively situate, and their successors, or being situate within an ecclesiastical district not being a parish as thereafter defined, then to the minister and church or chapelwardens of the church or chapel of such district, and their successors, in whom the same shall thereafter remain vested accordingly, but subject to and under the existing trusts and provisions respectively affecting the same.

By stat. 7 & 8 Vict. c. 37. ss. 1 & 2., if schools acquire the assistance of parliamentary grants, such schools are to be open to the visits and inspection of the government inspectors.

SCHOOL SITES.

Stat. 7 & 8 Vict.
c. 37. ss. 4 & 5.

By whom sites may be granted to the minister and churchwardens; or to the minister, churchwardens, and overseers.

Stat. 4 & 5 Vict.
c. 38. s. 8.

To whom estates vested in trustees for the purposes of education may be conveyed.

Stat. 7 & 8 Vict.
c. 37. ss. 1 & 2.

Visits of government inspectors.

SEQUESTRATION.

1. GENERALLY, pp. 1240—1245.

The writ of sequestration is an episcopal mandate to receive and apply the revenues of an ecclesiastical benefice — The writ is a continuing execution — Where the writ was returned to the Court of Exchequer before the plaintiff's execution was satisfied, it was returned to the bishop — Effect of sequestration where the qualification of a justice of the peace is from an ecclesiastical benefice — How debts may be enforced against spiritual persons at common law — Judgment of Lord Alvanley in ARBUCKLE v. COWTAN — Enforcement of debts under stat. 7 Geo. 4. c. 7. — When balance of a sequestrator's account vests in assignee under the Insolvent Act — Judgment of Dr. Lushington in LITTLE HALLINGBURY (ESSEX).

2. WHEN THE WRIT WILL, OR WILL NOT, BE ISSUED, pp. 1245—1254.

Generally—During the vacancy of a benefice by death—Where none will accept the benefice—Stat. 1 & 2 Vict. c. 106. s. 90.—Non-payment of curate's salary—When and from whom a curate, who is appointed by the special sequestrators of the bishop, can recover the arrears of his stipend—Judgment of Mr. Baron Parke in *DAKINS (CLERK) v. SEAMAN (CLERK)*—Neglect of duty—Stat. 1 & 2 Vict. c. 106. s. 54.—Residence may be enforced by monition, or the living sequestered—Stat. 1 & 2 Vict. c. 106. s. 93.—Non-resident incumbent not giving up his house of residence to the curate—Bishop can issue an original mandate of sequestration to repair dilapidations—Stat. 17 Geo. 3. c. 53. s. 6. and 1 & 2 Vict. c. 106. s. 67.—Non-payment of mortgage interest or insurance premiums—Trading contrary to stat. 1 & 2 Vict. c. 106.—Profits of a living which is in controversy sequestered—During suit—Cases of outlawry on civil process—Sequestration decreed at the suit of creditors in the absence of the incumbent—When warrant of attorney to secure the payment of an annuity need not be registered under stat. 8 Geo. 2. c. 6.—When the Court will order satisfaction to be entered on the bill of a former judgment—When a warrant of attorney to sequester the living of an incumbent is void—Publication of writ—Court will give immediate execution of writ—Practical directions respecting writs of fieri facias de bonis ecclesiasticis and sequestrari facias—Bishop a species of ecclesiastical sheriff—When sequestrations under stat. 1 & 2 Vict. c. 106. to have the priority—Stat. 1 & 2 Vict. c. 106. s. 112.—Regulations respecting the service and return of monitions and sequestrations.—Stat. 1 & 2 Vict. c. 106. ss. 54. & 111.—Mode of appealing to the archbishop of the province—Where personal service of the monition will be dispensed with—Judgment of Sir Herbert Jenner Fust in *MORSE v. MORSE*—Party may show cause—No cause shown—Service and return—Mode of proceeding where a party retains possession of the profits of the living in defiance of the writ of sequestration—Judgment of Sir Herbert Jenner Fust in *TOWN v. HURST*.

3. RIGHTS, DUTIES, AND LIABILITIES OF SEQUESTRATORS, pp. 1251—1259.

Sequestrator's bond—To what profits sequestrator entitled—Sequestrator cannot maintain an action for tithes in his own name—Sequestrator of a benefice, appointed by the bishop is the mere bailiff or agent of the bishop, and cannot maintain an action for the profits of the benefice—Judgment of Mr. Baron Parke in *HARDING v. HALL*—Bankrupt sequestrator will be restrained from receiving the proceeds—Proceedings after the sequestrators have performed their duties—Stat. 1 & 2 Vict. c. 106. s. 54.—Application of profits of benefice under sequestration—Where writ will not be awarded to enable the bishop to levy interest upon the judgment—Sequestrator bound to repair the vicarage house and buildings—Judgment of Lord Stowell in *HURBARD v. BERTFORD*—The expense of repairing the glebe house and premises, is prior to the demand of a creditor under a sequestration—Judgment of Chief Baron Woulfe in *BAKER v. SWAYNE*—When two livings sequestered under a warrant of attorney, and where the profits of one were not sufficient to pay off the arrears for which the sequestration had issued, and the profits of the two livings insufficient to discharge all—Compensation to sequestrators—Allowance for the supply of the cure—Sequestrators refusing to deliver up their charge—When the incumbent is dissatisfied with what the sequestrators have done—Judgment creditor entitled to an account of profits from a prior sequestrator.

GENERALLY.

1. GENERALLY.

The writ of sequestration is an episcopal mandate to receive and apply the revenues of an ecclesiastical benefice.

The writ of sequestration is a mandate issuing from the bishop to certain persons to receive and apply the revenues of an ecclesiastical benefice. This mandate may either be founded on a king's writ of levavi or fieri facias, or it may issue originally from the bishop, as when it is founded on a sentence of sequestration in his own court. A sequestration is founded on a king's writ of levavi or fieri facias, when a sheriff returns nulla bona to a common fieri facias, and that the defendant is a beneficed clerk, not having any lay fee, upon which the plaintiff may sue out a fieri facias de bonis ecclesiasticis, directed to the bishop of the diocese, or archbishop (during vacancy of the see), commanding him to make, of the ecclesiastical goods and chattels

belonging to the defendant within his diocese, the sum named in the writ. (1) GENERALLY.

The writ of sequestration is a continuing execution, and the sequestrator must continue in possession and not return the writ until the debt is levied, but he can return the amount levied from time to time (2): — and where a writ of sequestration was returned to the Court of Exchequer before the plaintiff's execution was satisfied, the Court allowed it to be taken off the file and sent back to the bishop, in order that he might take the return off the writ and certify to the Court what he had done under it. The rule for that purpose is absolute in the first instance. (3)

If the qualification of a justice of the peace be an ecclesiastical benefice, a sequestration, issued at the suit of a creditor, under which possession has been duly taken, and the profits received, it is an "incumbrance affecting the estate" within stat. 18 Geo. 2. c. 20. s. 1. (4)

In a penal action against the incumbent for acting as a justice without being qualified, the writ of sequestrari facias is admissible in evidence against him, although the judgment roll contains no entry of an award of the writ. (5)

Where upon issuing such a sequestration against a vicar, the bishop licensed him as a stipendiary curate; and directed the sequestrator to pay him 120*l.* a year as such; and assigned to him the vicarage house and grounds as a residence, which were together worth above 100*l.* a year. It was held, 1. that the salary and the grounds, being enjoyed by assignment of the bishop, and not simply as vicar, were no qualification within the above statute: — and 2. that the vicar being bound to reside, notwithstanding sequestration, occupied the house by right as vicar, and not by the bishop's assignment, which quoad hoc was merely void; but that such house, unless proved to be alone worth 100*l.* a year, was no qualification. (6)

The best illustration of the principles under which debts are enforced against spiritual persons at common law will be found in *Arbuckle v. Cowtan* (7), where Lord Alvanley observed, "With respect to all sums of money which had become due to the insolvent at the time when he took the benefit of the Insolvent Act, it is admitted that the plaintiffs are entitled to recover. Unquestionably every right and interest in possession, which had vested in the insolvent previous to the passing of stat. 37 Geo. 3. c. 112., was by that act immediately transferred to the assignees; and whatever action might have been brought by the insolvent, may be maintained by the assignees. So long as the defendant continued in the occupation of the vicarage, he was liable to the payment of the stipulated sum; as far, therefore, as the action extends to the arrears which were due at the time when the insolvent took the benefit of the act, the claim of the assignees may be maintained. Supposing a commission of bankrupt to extend to persons in

The writ is a continuing execution.

Where the writ was returned to the Court of Exchequer before the plaintiff's execution was satisfied, it was returned to the bishop.

Effect of sequestration when the qualification of a justice of the peace is from an ecclesiastical benefice.

How debts may be enforced against spiritual persons at common law.

Judgment of Lord Alvanley in *Arbuckle v. Cowtan*.

(1) *Vide* Tidd's Forms, 380. *Arbuckle v. Cowtan* 3 B. & P. 327. *Cottle v. Worthington* (Clerk), 5 B. & Ad. 453.

(2) *Marsh v. Fauceit* (Clerk), 2 Hen. Black. 582.

The origin of the term sequestration is derived from the Roman law: *Sequester dicitur apud quem plures eandem rem de qua controversia est, deposuerunt.* *Dictus*

ab eo quod recurrenti aut quasi sequenti eos qui contendunt, committitur. Dig. de Verb. Signif. l. 110.

(3) *Ahlerton v. St. Aubyn*, 6 M. & W. 150.

(4) *Puck q. t. v. Turpley* (Clerk), 9 A. & E. 468.

(5) *Ibid.*

(6) *Ibid.*

(7) 3 B. & P. 322.

GENERALLY.

Judgment of
Lord Alvanley
in *Arbuckle v.
Cowtan*.

holy orders, still the question will be, whether the assignees under this Insolvent Act have succeeded to the rights of the insolvent in all the revenues of the church of which he was vicar? For it is impossible to contend that they are entitled under the agreement, without also contending that if there had been no agreement they would have been in the same situation as the vicar himself, and would have been entitled to demand from the possessor of the glebe lands and from the terre-tenants of the parish the rent and tithes due to the vicar of Hernhill. In short it must be argued, that although the Insolvent Act does not expressly make the assignees vicars, yet that it invests them with all the ecclesiastical rights of the vicar. It is material to consider how the common law stood with respect to the rights with which creditors of persons in holy orders and beneficed clerks were clothed. No one is ignorant that at common law, land could not be taken into the hands of the creditor himself; the profits only could be taken by a writ of *levari facias* directed to the sheriff, who was thereby empowered to levy the profits arising from time to time for the benefit of the creditor. The common law was extremely jealous of obtruding any new tenant on the lord; it did not allow, therefore, any possession to be taken under the *levari facias*, but only the profits to be levied. By the Statute of Westm. 2, which gave the writ of *elegit*, an alteration was introduced in this respect. By that act the creditor was permitted to make use of a process by which he was put into possession of the land itself. At all times, however, the king was entitled to take possession under an extent, for the objection to changing the tenant did not apply to the case of the king. His right was independent of the Statute of Westm. 2.; but it must not be forgotten that, while the common law remained unaltered, the king never claimed any authority to take possession of ecclesiastical rights or dues by the hands of his own ministers the sheriffs. He was always obliged to have recourse to a writ to the bishop, under which the lands were sequestered. Under that writ possession was not given, but the ordinary was bound to take care that out of the revenues of the church the duties of the church should be provided for. We find in 2 Inst. (1) that Lord Coke says, 'If a person be bound in a recognisance in the Chancery, or in any other court, &c., and he pay not the sum at the day, by the common law if the person had nothing but ecclesiastical goods, the recognissee could not have had a *levari facias* to the sheriff to levy the same of those goods, but the writ ought to be directed to the bishop of the diocese to levy the same of his ecclesiastical goods.' In Gilbert on Executions (2) it is said, 'Elegit does not lie of the glebe belonging to the parsonage or vicarage, nor to the churchyard; for these are each *solum Deo consecratum*;' and for this is cited Jenkins' Rep. (3), where the same doctrine is laid down; and also that no *capias* or *fieri facias* can issue against a clerk, if it appears that he has no lay fee, but only a *levari facias* to the bishop. Jenkins refers to two cases from the year books, viz. 29 Edw. 3. 44. and 21 Edw. 4. 45. We have, therefore, complete authority for saying, that at common law no process ever issued, to a sheriff to levy on ecclesiastical property the debt due in an action; and Gilbert is well warranted in saying that no *elegit* lies. Sir W. Blackstone, in the third volume of the Commentaries (4), gives an account of

(1) P. 4.

(2) P. 40.

(3) P. 207.

(4) P. 418.

the writ of sequestration to the bishop of the diocese, which he says is in the nature of a *levari* or *fieri facias* to levy the debt and damages *de bonis ecclesiasticis*, which are not to be touched by lay hands. The same account is given of the writ in Burn's E. L. tit. *Sequestration*. There has been much argument respecting the power which a clergyman had over his own benefice. It has never been contended, however, that a parson was ever seised in fee; he had only a qualified right in his living, and at common law could make no lease to bind his successor, unless confirmed by the patron and ordinary. In the reigns of Hen. VIII. and Elizabeth several statutes were passed introducing further restrictions with respect to the power of ecclesiastics over their benefices. Until the 13 Eliz. c. 20. they all appear to have been made for the benefit of the successor. So great was the anxiety of the legislature, however, to prevent ecclesiastics from divesting their own rights, that the statute of 13 Eliz. c. 20., explained by stat. 18 Eliz. c. 11., empowers them to take advantage of their own non-residence to defeat leases made by themselves. Such has been determined to be the effect of that statute in the late case of *Frogmorton d. Fleming (Clerk) v. Scott (Clerk)*. (1) It is now clearly established that the half pay of an officer is not assignable, and unquestionably any salary paid for the performance of a public duty ought not to be perverted to other uses than those for which it is intended. Notwithstanding the case of *Stuart v. Tucker* (2), in which it was held that the half pay of an officer was assignable in equity, it was expressly decided in *Flarty v. Odum* (3), that it was not assignable at all; which decision met with general approbation. This doctrine is very analogous to that which has been adopted with respect to ecclesiastics; the same policy is applicable to both cases. Having considered in what manner debts might be enforced against ecclesiastics at common law, I will now consider whether the statutes relative to bankrupts and insolvents have introduced any alteration in this respect. That a private creditor should be able to avail himself of a writ of sequestration for the purpose of satisfying his debt out of the benefice of a clergyman, and yet that where the legislature has vested the whole property of the debtor in assignees for the benefit of the creditors in general, those assignees should not have any power to affect his benefice, would certainly be an anomaly in the law. Whether there be any means of obviating this anomaly I will not pretend to say. Lord Hardwicke, in the case *Ex parte Meymot* (4), abstains from laying down decisively in what manner the claims of the assignees upon such property might be made available. He seems, however, to think, that in a writ to the bishop the assignees might have the same remedy as any other creditor. But he never hints at an idea, that they could take possession of the benefice in the same manner as they might of lay property. The only question in that case was, whether a clergyman could be made a bankrupt. Mr. Wilbraham, in arguing for the negative, insisted that his living could not be assigned by the commission, for that the assignees must take all or none; and if they took all, nothing would be left to provide for the service of the cure. Lord Hardwicke, who inclined to think that a clergyman might be a bankrupt, after noticing this objection, and stating the common law rule

GENERALLY.

Judgment of
Lord Alvanley
in *Arbuckle v.*
Cowlan.

(1) 2 East, 467.

(2) 2 Black. (Sir W.), 1137.

(3) 3 T. R. 681.

(4) 1 Atk. 196.

GENERALLY.

Judgment of
Lord Alvanley
in *Arbuckle v.*
Cowtan.

with respect to sequestration, says, 'I do not see (but I give no opinion) why the same method may not be followed under the commission of bankruptcy, for it does not appear to me that this would supersede the bishop's authority.' As a long time has elapsed since this opinion was thrown out, during which some clergymen must probably have rendered themselves obnoxious to commissions of bankrupt, I desired inquiries to be made respecting the mode of proceeding adopted under those commissions. But these inquiries have not produced any instance in which proceedings against a benefice have taken place. Nor shall I undertake to point out in what manner the assignees in this case must proceed. But although there may be difficulties in the mode of proceeding, we are not, therefore, to hold that the nature of the property which a clergyman has in his benefice is changed by the operation of an insolvent act, or that the assignees under such an act will be entitled to demand and receive ecclesiastical dues. The agreement in this case is a mere letter of attorney given by the clergyman to the defendant. If this agreement could be deemed a case, it would be void upon the face of it. It would be a case on the parsonage house, with a covenant that the new tenant should occupy: this would be *felo de se*. Whatever advantage might be derived through the intervention of the ordinary, I am of opinion that by no conveyance of the party himself could he divest himself of his benefice. The same reasons which have induced the common law to prevent execution against a benefice by the hands of the king's civil ministers, may be urged with equal force against the action now brought by the assignees. We are, therefore, of opinion, that the action is not maintainable so far as it relates to the rent which has accrued subsequent to the assignment under the Insolvent Act."

Enforcement of
debts under
stat. 7 Geo. 4.
c. 7.

In *Bishop v. Hatch (Clerk)* (1) it was held, that the assignees of an insolvent clergyman do not acquire any right to his benefice, or the income of it, by the assignment, nor until they have obtained a sequestration as directed by stat. 7 Geo. 4. c. 57. s. 28., after adjudication by the Insolvent Debtors Court on such insolvent's petition: — that an individual judgment creditor may sequester the benefice for his own debt, notwithstanding the assignment to the provisional assignee: — and that the assignees, after adjudication, are not entitled to set aside the sequestration of such creditor, or to claim precedence over it for a sequestration issued by them pursuant to the act.

The sequestration of an ecclesiastical benefice is not an execution within stat. 7 Geo. 4. c. 57. s. 34., which enacts, that where a prisoner who applies for his discharge under that act, shall have executed any warrant of attorney to confess judgment, or have given any *cognovit actionem*, no creditor obtaining judgment thereupon shall, after the imprisonment of the debtor, avail himself of any execution issued or to be issued thereon by seizure and sale of his property. (2)

When balance
of a seques-
trator's ac-
count vests
in assignee.

In *Little Hallingbury (Essex)* (3) an application was made to the Court for the payment of the balance of a sequestrator's account of the sequestration of the rectory of Little Hallingbury, to be paid out of the registry to Mr. Samuel Fiske, the assignee, under the Insolvent Act, of the estate

(1) 1 A. & E. 171.

(2) When the Court is moved to set aside the sequestration of a benefice, issued by the

bishop, it is doubtful whether the bishop must be made a party to the rule. *Ibid*.

(3) 1 Curt. 556.

and effects of the Rev. John Stewart, the late deceased rector, and who was an insolvent debtor discharged under that act. Generally.

On the 21th of December, 1834, sequestration of the profits of the living issued to satisfy a debt of 1006*l.* 18*s.*, which had been recovered in an action against the late rector. The sequestrator, at the time of the late rector's death, had a balance in hand amounting to 81*l.* 11*s.* 6*d.*, which he paid into the registry.

The late incumbent was discharged under the Insolvent Debtors Act (1) on the 11th of March, 1835, and died on the 14th of that month; at his discharge, Mr. Fiske became his assignee, in trust for the benefit of his creditors. Mr. Fiske, as assignee, now claimed the balance in the registry. Mr. Burton, a builder, claimed 26*l.* for repairs done by him to the rectory house previously to the deceased's death; and stated that they were executed in obedience to the orders of the Bishop of London:—and that the then present rector had a claim for upwards of 300*l.* for dilapidations.

Counsel moved the Court to pay the balance in the registry to Mr. Fiske, the assignee, under the Insolvent Debtors Act.

Upon such facts Dr. Lushington observed, "This sum is the surplus of the proceeds of the living, after satisfying a sequestration, and would be payable to the deceased had there been no insolvency. Judgment of
Dr. Lushington in *Little
Hallingbury*
(*Essex*).

"The only question is, to whom can this money be legally paid? With regard to the claim of the present incumbent for dilapidations, he can only come in like any other creditor. There is one sum stated to have been laid out in the lifetime of the deceased, by order of the bishop; if that was ordered by the sequestrator, it would be his debt.

"I at first entertained some doubt whether this money could be paid to any other person than the personal representative of the deceased, or at least whether there must not be a personal representative before the Court; but on a careful view of the Insolvent Debtors Act I am of opinion, that it belongs to the assignee, and that no necessity exists that there should be a personal representative. I therefore direct it to be paid to him."

2. WHEN THE WRIT WILL, OR WILL NOT, BE ISSUED.

WHEN THE
WRIT WILL, OR
WILL NOT, BE
ISSUED.

Generally.

Sequestrations issue under the following circumstances:—1st. In obedience to writs from the courts of common law, whereby the bishop is directed to levy certain sums in pursuance of the statutes regulating Queen Anne's Bounty—2dly, Under the various provisions contained in stat. 1 & 2 Vict. c. 106. and in cases of outlawry—3dly, In pursuance of decrees or orders emanating from the Ecclesiastical Courts, in cases where clergymen are proceeded against before those jurisdictions—and, lastly, during vacancies.

In all such cases, before any proportion of the profits of the benefice can be applied in payment of debts, or for any other purpose, the service of the church must first be provided for, out of those profits; and when this has

(1) Stat. 7 Geo. 4. c. 57. amended by c. 44., & stat. 3 & 4 Gul. 4. c. 47.
stat. 1 Gul. 4. c. 38., stat. 2 Gul. 4.

WHEN THE
WRIT WILL, OR
WILL NOT, BE
ISSUED.

During the
vacancy of a
benefice by
death.

Where none
will accept the
benefice.

Stat. 1 & 2 Vict.
c. 106. s. 90.
Non-payment
of curate's
salary.

When and from
whom a curate,
who is ap-
pointed by the
special seques-
trators of the
bishop, can re-
cover the ar-
rears of his
stipend.

Judgment of
Mr. Baron
Parke in *Dakins*
(*Clerk*) v.
Seaman
(*Clerk*).

been done, the buildings and fences in the glebe, and the chancel also, when the incumbent repairs, ought to be sustained and kept in proper order.

The right of nominating the sequestrator lies with the bishop, but when the sequestration issues on account of debts, it may often happen, that the sequestration is committed to the creditor or his nominee; in all other cases, the bishop exercises his right of nomination by selecting according to his own judgment. (1)

When a living becomes void by the death of an incumbent or otherwise, the ordinary is to send out his sequestration to have the cure supplied, and to preserve the profits, for the use of the successor. (2)

Sometimes a benefice is kept under sequestration for many years together, or wholly; namely, when it is of so small value, that no clergyman fit to serve the cure will be at the charge of taking it by institution; in which case the sequestration is committed sometimes to the curate only, sometimes to the curate and churchwardens jointly. (3)

By stat. 1 & 2 Vict. c. 106. s. 90. payment of a curate's salary, together with the full costs of recovering the same, as between proctor and client, may be enforced by monition and sequestration of the profits of the benefice, to be issued by the bishop on the application of the curate or his representatives.

In *Dakins (Clerk) v. Seaman (Clerk)* (4) it was held, that where a curate is appointed by the special sequestrators of the bishop of the diocese to serve the cure of a benefice during the vacation between the death of the last and the appointment of the next incumbent, he may, although not licensed by the bishop, and notwithstanding stat. 1 & 2 Vict. c. 106., recover his reasonable stipend in an action of debt under stat. 28 Hen. 8. c. 11. from the next incumbent, the tithes which accrued during the interval not being sufficient to pay him a reasonable stipend; Mr. Baron Parke stating, "I am of opinion that the plaintiff may maintain an action for his stipend. The main question is, whether the statute of Henry VIII. is repealed by the statute of Victoria, and whether the curate can recover in a court of common law? It is to be observed, that as the words of the latter act are affirmative, both statutes are compatible, and may well stand together. The language of the statute of Victoria affords strong ground for the argument, that as the courts of common law cannot determine what salary the curate is to receive, so neither can they assist him in recovering it; and undoubtedly that argument applies, where the curate is appointed under that act; but if the curate is not appointed by the bishop, the statute of Henry VIII. remains in full force and effect. It is said, that the canon law requires the curate to be licensed; but I should have great difficulty in determining, that the effect of the statute of Henry VIII. is taken away by the canons of 1603. That question, however, need not be considered here, for I am not satisfied, that the plaintiff need be licensed under the 46th canon. A licence applies to the case where the appointment is permanent; but here the plaintiff is employed by the sequestrators, and is not appointed for any specified time. The sequestrators are to see that the duties of the

(1) Ecclesiastical Commissioners Report, Feb. 15. 1832, p. 52.

(2) Godolphin's Repertorium, Append. 14.

(3) Williams on the Clergy, 486.

(4) 9 M. & W. 777.

parish are performed by somebody, and accordingly they appoint the plaintiff for a short period: it may not, perhaps, be necessary for them to provide for more than two Sundays. Under the circumstances of the present case, I think the plaintiff is entitled to our judgment."

Sometimes, for neglect of serving the cure, the profits of the living are to be sequestered. (1)

By stat. 1 & 2 Vict. c. 106. s. 54., in cases of non-residence, a bishop, instead of proceeding for the penalties in the act, or under stat. 57 Geo. 3. c. 99., may enforce residence by monition, and after the return of the monition can issue an order, under his hand and seal, requiring any spiritual person to proceed and reside within thirty days; and in case of non-compliance with such order, the bishop may sequester the profits of the benefice till it be complied with; but by sect. 113. no sequestration is to issue until this order has been served in the way provided for the service of monitions; and if an incumbent absent himself after the return in compliance with the order, a fresh sequestration may issue without further monition.

By stat. 1 & 2 Vict. c. 106. s. 93. a bishop having required the curate of a non-resident incumbent to reside in the house of residence of the benefice, may assign him the same with a portion of the glebe land, and if the possession of the premises so assigned be not given up to such curate, the bishop may sequester the profits of the benefice.

Sometimes when the houses and chancels that the incumbent is bound to repair, are ruined and ready to fall, if after due admonition he delay to begin to amend the same within two months, then the bishop of the diocese, that time being elapsed, can sequester the fruits and tithes till those defects are amended; and though the admonition proceed from the archdeacon, yet the bishop only has that of sequestration. (2)

Lay impropriators are generally under the same obligation of repairing the chancel as spiritual rectors, but inasmuch as such impropriations have become lay fees, they are exempt from spiritual jurisdiction. (3)

By stat. 17 Geo. 3. c. 53. s. 6. & stat. 1 & 2 Vict. c. 106. s. 67., in default of the incumbent to insure the house of residence, or in case of his not paying the principal and interest due on any mortgage made under the powers of those acts, the bishop can sequester the profits of the benefice till such payment or insurance be made.

By stat. 1 & 2 Vict. c. 106. s. 31. bishops are empowered to cite spiritual persons trading contrary to that act, who can suspend them before the Chancellor of the diocese, or other competent judge, for the first offence for one year, for the second for as long as he shall see fit; and during such suspensions the bishop can sequester the profits of their benefices.

Sometimes the fruits and profits of a living which is in controversy, either by the consent of parties, or the ordinary's or judge's authority, are sequestered and placed for safety in the custody of a third party. And thus, when two different titles are set on foot, the rights are carefully preserved and given to him for whom the cause is adjudged. (4)

And the judge can also appoint some minister to serve the cure for the time that the controversy exists, and to command those to whom the

WHEN THE
WILL WILL, OR
WILL NOT, BE
ISSUED

Neglect of
duty.

Stat. 1 & 2.
Vict. c. 106.
s. 54.
Residence may
enforced by
monition, or
the living
sequestered.

Stat. 1 & 2
Vict. c. 106. s.
93.
Non-resident
incumbent not
giving up his
house of resi-
dence to the
curate.

Bishop can
issue an original
mandate of se-
questration to
repair dilapida-
tions.

Stats. 17 Geo.
3. c. 53. s. 6. &
1 & 2 Vict. c.
106. s. 67
Non-payment
of mortgage in-
terest or insu-
rance premium.
Trading con-
trary to stat. 1
& 2 Vict. c. 106.

Profits of a liv-
ing, which is in
controversy, se-
questered.
During suit

(1) Watson's Clergyman's Law, 172.

(2) Godolphin's Repertorium, Append.

(3) Vide ante, tit. DILAPIDATIONS.

(4) Godolphin's Repertorium, Append.

WHEN THE
WRIT WILL BE
ISSUED.

Cases of out-
lawry on civil
process.

Sequestration
decreed at the
suit of creditors
in the absence
of the incum-
bent.

When warrant
of attorney to
secure payment
of an annuity
need not be re-
gistered under
stat. 8 Geo. 2.
c. 6.

When the
Court will or-
der satisfaction
to be entered
on the bill of a
former judg-
ment.

When a warrant
of attorney to
sequester the
living of an in-
cumbent is
void.

Publication of
writ.

sequestration is committed, to allow such salary as he shall assign out of the profits of the church to the parson that he orders to attend the cure. (1)

In cases of outlawry on civil process, a writ of sequestration will issue on a special *capias utlagatum*, finding that the defendant was possessed of an ecclesiastical benefice, but of no lay fee. (2) But where the sheriff's return to such a writ was that the defendant had no lay goods, nor any lay fee, but that he was a beneficed clergyman, not stating the name or situation of the benefice, the Court refused a writ of sequestration, but suggested a motion for a rule calling upon the sheriff to amend his return. (3) In this case the bishop can name the sequestrators himself, or may grant the sequestration to such persons as shall be named by the party who obtained the writ. (4)

If the sequestration be laid and executed before the day of the return of the writ, the mesne profits may be taken by virtue of the sequestration, after the writ is made returnable, otherwise not. (5)

Sequestration of a living will be decreed at the instance of the creditors of the incumbent, if he do not appear to a monition to show cause. (6)

In *Cottle v. Warrington (Clerk)* (7) it was held, that a judgment entered upon a warrant of attorney, given by a beneficed clergyman in the North Riding of Yorkshire, to secure payment of an annuity, need not be registered under stat. 8 Geo. 2. c. 6., for though it may be enforced by sequestration, the benefice is not affected by the judgment.

It appeared in the foregoing case that the judgment was for 1800*l.*, and the warrant of attorney provided, that on the death of the defendant, and full payment of arrears of the annuity, satisfaction should be entered on the record. A second judgment was signed by a different creditor, who sued out a *sequestrari facias* thereupon; and although at that time the former creditor had by sequestration levied more than 1800*l.* for arrears of his annuity, there were arrears still due. The Court ordered that satisfaction should be entered on the roll of the former judgment, as of the date when judgment was signed by the second creditor; and that the sums levied since should be paid over to him. But they refused to order payment to this creditor of the surplus over 1800*l.*, levied before the signing of his judgment.

If a warrant of attorney appear on the face of it to be a charge on a benefice, or if it authorise the issuing an execution from time to time for the arrears of an annuity as they become due, and expressly give power to sequester the living of the incumbent, and take possession so as to be able to apply the profits thereof in satisfaction of the arrears and the future payments of the annuity, it is void, and may be set aside. (8)

It is not requisite that a writ of sequestration should be published before the return day of the *levari facias* on which it is founded, or that a copy should be fixed to the church door where that is not the usual mode of

(1) Watson's Clergyman's Law, 308.

(2) *Rex v. Hind (Clerk)*, 1 C. & J. 389.

(3) *Rex v. Powell (Clerk)*, 1 M. & W. 321.
Rex v. Armstrong (Clerk), 2 C. M. & R. 205.

(4) 3 Burn's E. L. 590.

(5) *Ibid*

(6) *Abbitt v. Gurney*, 2 Notes of Cases
Ecclesiastical, 75.

(7) 5 B. & Ad. 447.

(8) *Saltmarsh v. Hewett (Clerk)*, 1 A. &
E. 812. *Newland v. Watkin*, 9 Bing. 113.
1 Law Journ. N. S. 177.; *see vide dicta*
per Lord Denman in *Moore v. Remick*,
7 A. & E. 907. Chitty on Contracts,
726.

publication in the diocese of the sequestered benefice, because the property is bound from the time when the sequestrator is appointed, and the publication of notice is only necessary to give priority in cases of conflicting rights, and the sequestration only operates from the time of publication. (1)

In *Campbell v. Whitehead* (2) Lord Stowell observed, that the Court is bound not to delay the immediate execution of a writ, but to give the party all the benefit of priority.

The writ of *feri facias de bonis ecclesiasticis* is tested and made returnable, and must be sealed and endorsed as a common *feri facias*; and being taken to the registrar of the diocese, he will thereupon issue a sequestration, which is in the nature of a warrant, directed usually to the churchwardens, requiring them to levy the debt of the tithes and other profits of the defendant's benefice. (3) On proper security being given, it may be directed to sequestrators of the plaintiff's own selection. If the entire debt be not levied in one diocese, the plaintiff, on return of the writ, may have a *testatum fieri facias de bonis ecclesiasticis* into another diocese for the residue; or he may have an alias into the same diocese. (4)

Instead of a *feri facias*, the plaintiff may sue out a writ of *sequestrari facias*, directed, tested, and returnable, &c. as the *feri facias*, commanding the bishop to enter into the rectory, and take and sequester the same, and hold them until of the rents, tithes, and profits thereof, and of the other ecclesiastical goods of the defendant, he have levied the plaintiff's debt. This writ is in the nature of a *levari facias*, the other is in the nature of a *feri facias*. (5)

In such cases the bishop acts ministerially, and in aid of the sheriff, who, having no power to levy except upon lay fees, it is necessary to have recourse to some other channel in order to levy on ecclesiastical possessions; for this purpose the bishop is put in the place of the sheriff, or is a sort of ecclesiastical sheriff. Being merely a ministerial officer the writ is mandatory on him, and he is bound to execute the first valid writ in point of date, by analogy to the case of a sheriff (6); although it may happen that another writ, subsequent in date, may have been entered before it, by the bishop's registrar. (7) Acting, therefore, as sheriff, the Court of Queen's Bench has the same power over the bishop as over the sheriff (8); he may be ruled to return the writ; and if he make a false return, will be liable to an action. (9)

With regard to sequestrations issued under stat. 1 & 2 Vict. c. 106, they are to have priority, and the sums to be thereby recovered are to be paid and satisfied in preference to all other sequestrations, with the following

WHEN THE WRIT WILL BE ISSUED.

Court will give immediate execution of writ.

Practical directions respecting the writs of *feri facias de bonis ecclesiasticis* and *sequestrari facias*.

Bishop a species of ecclesiastical sheriff.

When sequestrations under stat. 1 & 2 Vict. c. 106, to have priority.

(1) *Bennett v. Apperley (Clerk)*, 6 B. & C. 690. As to the effect of such writs in establishing the right to property, vide *Giles v. Grover*, 1 Cl. & F. 74—177. *Lucas v. Nockells*, 10 Bing. 182. Vide ante, tit. *Public Worship*, stat. 7 Gul. 4. & 1 Vict. c. 45.

(2) 1 Consist. 311, in not.

(3) Tidd, 1023, 1024. 3 Black. Com. 418.

(4) Archb. by Chitt. 965, 966.

(5) Ibid. 966. *Marsh (Knt.) v. Fawcett (Clerk)*, 2 Hen. Black. 582.

(6) *Campbell v. Whitehead*, 1 Consist. 311, in not.

(7) *Rex v. London (Bishop of)*, 1 D. & R. 486.; et vide *Smallcomb v. Buckingham*, 5 Mod. 376. *Mosely v. Warburton*, 1 Salk. 320. 1 Ld. Raym. 265.

(8) *Rex v. London (Bishop of)*, 1 D. & R. 486.

(9) *Pickard v. Paiton*, 1 Sid. 276. *Mosely v. Warburton*, 1 Salk. 320. 1 Ld. Raym. 265. Roger's Eccles. Law, 827.

**WHEN THE
WRIT WILL BE
ISSUED.**

**Stat. 1 & 2 Vict.
c. 106. s. 112.
Regulations
respecting the
service and re-
turn of moni-
tions and se-
questrations.**

excepted cases : — Sequestrations founded on judgments duly docketed before the passing of stat. 1 & 2 Vict. c. 106., and sequestrations issued under stat. 17 Geo. 3. c. 53., and which are prior in point of time.

Where proceedings are directed by stat. 1 & 2 Vict. c. 106. to be by monition and sequestration, the monition by sect. 112. is to issue under the hand and seal of the bishop : — The service of the monition, or any other instrument or notice issued under the act, not specially provided for, is to be made personally, by showing the original, and leaving, with the party to be served, a true copy thereof : — If the spiritual person to whom it is directed cannot be found, a true copy must be left at his usual or last known place of residence, and another copy must be affixed upon the church door of the parish in which the place of residence is situate : — If the service be of a monition, another copy must be left with the officiating minister, or one of the churchwardens, and another copy must be affixed on the church door of the parish in which the benefice is situate : — The monition, or other instrument or notice, immediately after its service, must be returned into the Consistorial Court of the bishop, and be there filed, together with an affidavit of the time and manner in which it has been served.

If an appeal be made against a sentence of sequestration and lawfully prosecuted, the party sequestered can enjoy the profits pending the appeal. (1)

**Stat. 1 & 2 Vict.
c. 106. ss. 54.
& 111.
Mode of appeal-
ing to the
archbishop of
the province.**

There is only one case under stat. 1 & 2 Vict. c. 106. in which an appeal is given to the archbishop against a sequestration by the bishop, and that is by sect. 54., in cases of non-compliance with a monition to reside. The mode of appealing in this and in all other cases within the provisions of that act, are directed by sect. 111.; by which all appeals must be in writing, and signed by the party appealing : — The appellant must give security in such form and to such an amount for payment of costs to the bishop, as the archbishop may direct, if the decision be against the appellant : — After such security has been given, the archbishop by himself, or by a commissioner or commissioners appointed under his hand from among the other bishops of his province, must make or cause to be made inquiry into the matter complained of; and after such inquiry, or after a report in writing from the commissioner or commissioners, give his decision upon such appeal in writing : — If he decide the merits of the appeal against the appellant, he must also direct and award whether any, and what amount of costs are to be paid by the appellant to the bishop; and if he decide in favour of the appellant, he is then to award and direct whether any, and what amount of costs are to be paid by the bishop to the appellant.

**Where personal
service of the
monition will
be dispensed
with.**

In *Morse v. Morse* (2), which was originally a suit for divorce by reason of adultery by Mrs. Morse against the Rev. Mr. Morse, her husband, in which the Court pronounced the sentence of separation prayed by the wife. The costs and alimony for two years being unpaid, on the 12th February, 1846, a monition was taken out, but could not be personally served upon Mr. Morse, who was residing beyond the seas, and it was returned on the 1st of June. A monition by ways and means was then decreed, which

(1) Gibson's Codex, 1113. 3 Burn's E. L. 590. Lyndwood, Prov. Const. Ang. 104.

(2) 5 Notes of Cases Ecclesiastical, 49.

could be served in no other form than on the church door of Mr. Morse's rectory, and on his proctor. No appearance being given for Mr. Morse, counsel moved the Court to pronounce him in contempt, in order that it might be signified to the Court of Chancery for a sequestration of his living under stat. 2 & 3 Gul. 4. c. 4. It appeared that there was no doubt Mr. Morse was aware of the proceedings, as in a letter from him he acknowledged that he had received the bill of costs :

WHEN THE WRIT WILL BE ISSUED.

Sir Herbert Jenner Fust observed, "I see no distinction between this case and that of *Greenhill v. Greenhill* (1), in which the judge of the Consistory Court of London considered that the party might be pronounced in contempt for the purpose of sequestrating his estate under stat. 2 & 3 Gul. 4. c. 4. Acquiescing entirely in the view taken by that learned judge, I am bound to pronounce the party contumacious, and to decree his contempt to be signified to the Court of Chancery, in order to the profits of his living being sequestrated."

Judgment of Sir Herbert Jenner Fust in *Morse v. Morse*.

In case of a monition, under stat. 1 & 2 Vict. c. 106. s. 112., the party monished may show cause, by affidavit or otherwise, why a sequestration should not issue according to the tenor of the monition.

Party may show cause.

If no sufficient cause be shown within the time assigned by the monition, the sequestration can issue under the seal of the Consistorial Court of the bishop of the diocese.

No cause shown.

The sequestration is to be served and returned into the registry of the Court, in like manner as is directed for the service and return of monitions issued under the act.

Service and return.

If a party retain possession of the profits of the living in defiance of the writ of sequestration, application for redress must be made to the court of the diocese in the first instance, and not to the Court of Arches. Thus in *Trower v. Hurst* (2) it appeared, that after sentence articles were exhibited in virtue of letters of request against a clerk in holy orders and proved ; that a sentence of suspension was thereupon pronounced for three years *ab officio et a beneficio* ; a motion on behalf of the sequestrator appointed by the bishop of the diocese (to whom the sentence was notified) was then made, for a monition to show cause why the party should not be pronounced in contempt for disobedience to the orders of the Court, by retaining the profits of the living, was rejected, on the ground that the court of the diocese was the proper forum in the first instance, and that the Court of Arches could be set in motion only upon a return from the bishop, the ecclesiastical sheriff, of his inability to levy : — Sir Herbert Jenner Fust observed, "This is certainly a very novel proceeding in this Court, for I cannot call to mind any case precisely similar in its circumstances in which this Court has been asked to enforce its sentence against the incumbent of a parish whom it has suspended from the performance of divine offices, and also from the receipt of the emoluments of the living."

Mode of proceeding where a party retains possession of the profits of the living in defiance of the writ of sequestration.

Judgment of Sir Herbert Jenner Fust in *Trower v. Hurst*.

"The mode of proceeding is this:—after the sentence pronouncing that the rector be suspended *ab officio et a beneficio* for three years, a notice of the sentence is given to the bishop in whose diocese the rectory is locally

(1) 1 Curt. 462.

(2) 5 Notes of Cases Ecclesiastical, 160.

WHEN THE
WRIT WILL BE
ISSUED.

Judgment of
Sir Herbert
Jenner Fust
in *Trower v.*
Hurst.

situated, so that he may take the legal means of enforcing obedience to the decree of this Court. The bishop is considered as the ecclesiastical sheriff; he is to levy and sequester, and to take care that the duties of the living are performed, and the emoluments properly collected and appropriated: for which purpose a sequestrator is appointed, who is to collect the profits and make a return to his registry of what has been done; thus assimilating the practice to that of the courts of common law. In the courts of common law the sheriff is to levy; and if he cannot levy, he makes a return to the Court, which resorts to other means; and if the Bishop of Chichester had made a return, or certified to me that he had appointed a sequestrator, and that Mr. Hurst had refused to pay the sequestrator, consequently, that the sentence could not be enforced, I might have granted a monition to show cause why Mr. Hurst should not be pronounced in contempt for disobedience to the orders of the Court. But here is a mere affidavit from the gentleman appointed sequestrator by the Bishop of Chichester, of matters respecting which the Court knows nothing, except from the affidavit; and a motion is made for a monition calling upon Mr. Hurst to show cause why he should not be pronounced in contempt for disobedience to the orders of the Court, for this is the form of the motion now made: at first it was for payment to the sequestrator of the sums due; this is certainly the better mode. But I am not in possession of information regularly transmitted to me as to the facts. The cases of *Moysey (D.D.) v. Hillcoat (D.D.)* (1) and *White v. Wilcox* (2) were different from this case; for there the Court had suspended the parties from the performance of divine offices, and they continued to perform them, and the Court issued a decree or monition to show cause why they should not be pronounced in contempt for disobeying the orders of the Court. So in this case, if Mr. Hurst had continued to perform divine offices, the Court would have issued its monition. But this is not the ground of complaint, which relates to the rents and profits of the living, and it is necessary for that purpose that the Bishop of Chichester should make a return. I am not satisfied that I could grant the prayer on the ground that there has been on the part of Mr. Hurst a refusal to give up the occupation of the glebe. As far as I understand the affidavit, there has been an agreement between the parties that he should take the occupancy, paying rent. It may be that this rent, and the rents received from others, have not been paid; but I must have a return from the Bishop of Chichester that Mr. Hurst has not complied with the terms of the sentence, by not paying what is due from him, and what he has received from other persons. Till then, I cannot proceed to decree a monition to issue. I know what the inconvenience would be of issuing a monition to show cause; that it would be followed up by a sentence pronouncing the money to be due to the sequestrator; but unless I am satisfied in the first instance that I have power to follow this up by pronouncing the party in contempt and directing his contempt to be signified, I am unwilling to issue such a monition, and I could not do it without a return from the ecclesiastical sheriff.

“I am therefore of opinion, that I am not in a situation to grant the prayer. Whether on a return from the Bishop of Chichester the Court would then

(1) 2 Hagg. 30.

(2) Consist. and Arches, 1853, not rep.

enforce its sentence, is another question. Upon a full statement to the Court as to the circumstances, I might possibly be in a situation to grant the prayer; at present, I am of opinion that I am not in a condition to do so, and I must refuse the motion."

In the succeeding Trinity Term (1) another application was made by the same parties for a monition in consequence of a return having been made by the Bishop of Chichester setting forth that the defendant continued at the date of the return (April 20.), in spite of repeated demands, to return the profits of the living on the 4th May.

This application was refused by Sir Herbert Jenner Fust in the following language:—"Upon the last occasion, when a motion was made to pronounce the party in contempt for not having paid the rent of the glebe land, and the sum due for rent-charge, it struck the Court that there would be very great difficulty in drawing up a monition to carry the object into effect, namely, to pronounce the party in contempt for not paying the rent-charge and the rent of the glebe land, and the Court said it should like to see the form in which the monition was to be drawn up. The draft monition is now before the Court, but the motion is a different one, namely, for a monition to show cause why the party should not pay these sums.

"Now, in the first place, the Court is not satisfied that it has the power of enforcing such a decree: it must be satisfied that, if the party refuses to appear, it could follow up the monition by a decree to pay the money, and I am not satisfied that I am in a condition to enforce the payment at the present moment. If I were satisfied that the Bishop of Chichester's Court had no power to enforce payment, that would be a different thing; but I am not satisfied of that. Why he cannot follow up the sequestration I am not informed. The party is called upon to pay not only the rent of the glebe land, but the rent-charge upon land in his own possession. The possession of the glebe land having been demanded by the sequestrator, at the suggestion of Mr. Hurst, he was suffered to remain in possession of that land, accepted as a tenant, at a rent fixed by a surveyor. The rent, therefore, is owing from him not qua rector, but qua tenant. I do not apprehend that any ecclesiastical court has power to enforce the delivering up of the land; all it can do is to levy the profits of the land; and with regard to the rent-charge, that must be recovered in the same way as every other rent-charge. I cannot understand how the Court can enforce payment not to its own officer, but to the officer of the Bishop of Chichester, to whom the bond is given. It would be only where the Court was satisfied that there was no other remedy that it would go out of its way, especially in a case where the party has been suffered to remain in possession of the land, under a verbal agreement, as tenant of the sequestrator. I confess I should be exceedingly unwilling to grant a monition to show cause unless I were convinced in my own mind that the decree could be enforced. I am not prepared to take upon myself this onus unless driven to it by necessity, and unless I were satisfied that the Bishop of Chichester could not enforce payment by his own court and officers. For what purpose was the sequestration issued? To take care that the duties of the office were performed during the time Mr. Hurst was suspended, and to see that the surplus

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(1) 5 Notes of Cases Ecclesiastical, 382

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profits, if any, were expended for the purposes of the living. I have endeavoured to discover some course by which I could enforce payment of this money; but how can I issue a monition to show cause why these sums of money should not be paid for rent-charge on land which Mr. Hurst holds as an occupier, or for rent of the glebe land which is due from him as tenant, not as rector? Mr. Hurst does not withhold the money from the Court, but from the sequestrator.

"I am of opinion that I am not in a situation to decree this monition; and I must, therefore, reject the motion. It shows the unfortunate situation the party is placed in."

RIGHTS,
DUTIES, AND
LIABILITIES
OF SEQUESTRA-
TORS.

Sequestrator's
bond.

To what profits
sequestrator en-
titled.

Sequestrator
cannot main-
tain an action
for tithes in
his own name.

The sequestra-
tor of a bene-
fice, appointed
by the bishop,
is the mere
bailiff or agent
of the bishop,
and cannot
maintain an
action for the
profits of the
benefice.

Judgment of
Mr. Baron
Parke in
Harding v.
Hall.

3. RIGHTS, DUTIES, AND LIABILITIES OF SEQUESTATORS.

It is usual for the ecclesiastical judge to take a bond from the sequestrators, well and truly to gather and receive the tithes, fruits, and other profits, and to render a just account. (1)

The sequestrator is entitled to all the future profits, but not to the amount of the sequestrated living. (2) So it has been held, that a rector whose glebe was sequestered, was entitled to a verdict in ejectment upon a demise laid before the sequestration took effect, but he could not have an *habere facias possessionem* because he was no longer entitled to possession. (3)

It has been held, that sequestrators could not maintain an action for tithes in their own name at the common law, nor in any of the king's temporal courts; but only in the spiritual court, or before the justices of the peace, where they had power by law to take cognisance.

The sequestrator of a benefice, appointed by the bishop under a writ of *sequestrari facias*, is the mere bailiff or agent of the bishop, and has no such interest in the profits as will enable him to maintain an action at law against a party who wrongfully receives them. Thus, in *Harding v. Hall* (4), Mr. Baron Parke observed, "I agree in opinion with my Lord Chief Baron, that in this case the nonsuit was right, and I still entertain the same opinion which I expressed when this matter was argued before me at *nisi prius*."

"The action was brought to recover certain profits of a living, which came to the hands of the defendants at different times. It appears that a person of the name of Iveson was the sequestrator under an execution at his suit, on two different judgments. He employed a person of the name of Collett to receive the profits of the living under the sequestration. Iveson became bankrupt, and his assignees still continued Collett in their employ, to receive the profits of the living. Iveson afterwards died, the assignees still continuing, through the agency of Collett, to receive the profits of the living; and they are now called upon to pay over the whole of these profits which had been received by Collett; those which came to their hands while Iveson was sequestrator, those received after his bankruptcy, and those received since the death of Iveson, by the assignees, by

(1) Watson's Clergyman's Law, 308.

(2) *Waite (Clerk) v. Bishop*, 1 C. M. & R. 507. *Rex v. Armstrong (Clerk)*, 2 ibid. 205.

(3) *Doe d. Morgan (Clerk) v. Bishop*, 5 Camp. 447.

(4) 10 M. & W. 42.

the agency of Collett. If there were any portion of those profits which could be the subject of an action by the sequestrator, I was wrong in directing a nonsuit.

“It seems to me, that there is no difficulty whatever in the case, except in regard of that portion of the profits which have been received by the assignees, after the determination of the sequestratorship to Iveson by his death. There is no doubt what the character of a sequestrator is, and that it is one that cannot pass to his executors, administrators, or assigns; and therefore, if the plaintiff was entitled to recover as to that portion of the tithes received by the assignees since the death of Iveson, I ought not to have directed a nonsuit, but a verdict for the plaintiff, subject to the other questions in the cause.

“But it appears to me, that even for that portion of the profits of the living the plaintiff cannot recover; for the right which the sequestratorship gave him involves no interest whatever. Let us consider, what the right of the sequestrator is. When a judgment is obtained against a spiritual person, a *levari facias* issues to the bishop, and he is commanded, as in this case, ‘to enter into the rectory and parish church of Lockington, and take and sequester the same into his possession, and hold the same in his possession until he shall have levied the debt and damages, costs and charges, out of the rents, tithes, oblations, obventions, fruits, issues, and profits thereof, and other ecclesiastical goods in his diocese,’ and so forth. Therefore the command is to the bishop to enter and take possession of the living; and the bishop appoints a sequestrator to make such entry. Then the publication of the sequestration takes place; and the question is, what is the effect of this delegation by the bishop? The effect clearly is, to take the possession out of the rector, and to place it in some person in lieu of the rector. In the case of *Doe d. Morgan (Clerk) v. Bluck* (1) it was decided that, after the publication, the right of ejectment by the rector is taken away; therefore I assume, that the possession is vested in some other person; and the question is, who is the person so put into possession? It is the bishop, according to the terms of this writ, and nobody else. He directs the sequestrator to act for him; and though clothed with duties higher than those an ordinary bailiff has — for he has undoubtedly some things to do, by consent of the bishop, different from the duties of the sheriff’s bailiff — still, in point of law, he is the servant of the bishop, and has no interest at all in any of the profits of the living, but is acting merely as a receiver. That, as it appears to me, is the character of the sequestrator, and that is the character which he appears to have had according to the cases. Thus, according to the case of *Jones v. Barrett* (2), the sequestrator, having no interest in the profits of the living cannot alone file a bill for tithes, or for the profits of the rectory, but the bishop is the proper person to do so. There is no authority whatever to show that the sequestrator has any interest in the profits of the living. A case was cited from Barnardiston’s Reports, of *Calder (Sir T.) v. Ross* (3), which was ingeniously made use of by Mr. Baines, in his able argument, to show, that if the party have authority, not merely to receive but to distribute, he has an interest in

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LIABILITIES
OF SEQUESTRA-
TORS.

Application of
Judgment of
Mr. Baron
Parke in
*Harding v.
Hall*.

(1) 3 Camp. 447.

(2) Bunb. 192.

(3) 1 Barnard. K. B. 198.

RIGHTS,
DUTIES, AND
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OF SEQUESTRA-
TORS

Judgment of
Mr. Baron
Parke in
*Harding v.
Hall*.

the subject of the sequestration, and may support the action. But the case is no authority for that position: it is only the opinion of the lord chancellor as to what the Scotch law probably was in the case of the sequestration of the effects of a convicted traitor: and he gave an opinion, that if it was only to collect, in that case he would have no interest; but if it was to distribute amongst the different creditors, without rendering any account to the Court, it gave him a title to recover. It is not intended to be laid down, as a general proposition of law, that if a person is appointed a receiver, where there may be conferred upon him an authority not merely to receive but also to distribute, that would give him an interest in the estate. The case cannot be carried to that extent; and there is no other authority for saying, that a sequestrator has an interest in the subject-matter of the sequestration.

“Then, it was contended, that this was like the case of an administrator. But his authority is founded on the statute of 31 Edw. 3. st. i. c. 11. (1), which expressly states, that the ordinary is to depute persons who are to have actions to recover debts due to a deceased intestate. That gives an interest, by the very words of the statute, in all the personal effects of the deceased, and takes them out of the bishop, and vests them in the administrator. It is by an express law, therefore, that an administrator has an interest in the effects of the intestate. Therefore, even as to that portion of the profits of the living, that may be said to be analogous to the case put in the argument, of the tithe grower having set out tithes, and the intervention of a stranger to take them away, I am compelled by the authorities, and by the nature of the case, to say, that no right of action would exist in the sequestrator. It appears to me, that the right would be in somebody else, either in the rector or in the ordinary, probably in the ordinary, since, according to the case of *Doe d. Morgan v. Bluck*, the effect of the sequestration is to put the rector out of possession; and then it follows, that the ordinary is in possession, in virtue of the writ by which he is required to take possession. Then I consider, that the sequestrator is the mere servant of the ordinary, and subject to his authority.

“The cases that have been cited from the Ecclesiastical Reports, of the sequestrator being called upon to account in the courts of the ordinary, for not performing his duties, are to be explained on the ground, that there the ordinary was calling his own officer to account for not performing the duties he had undertaken to do, he having received a warrant to act upon his mandate.

“Upon the whole, it appears to me that this action cannot be sustained, and therefore that the nonsuit was right.”

Bankrupt se-
questrator.

If a person, appointed sequestrator, become bankrupt, the Court of Review will restrain him from receiving the proceeds, but the assignees may use his name. (2)

When se-
questrators
have performed
their duties.

After the sequestrators have performed the duty required, the sequestration is to be taken off, and the application of the profits is to be made according to the direction of the ordinary.

Stat. 1 & 2 Vict.
c. 106. s. 54.

By stat. 1 & 2 Vict. c. 106. s. 54. the profits during sequestration are to be applied: —

(1) *Ante*, 66

(2) 1. Deacon, 87.

1. After deducting the necessary expenses for serving the cure.
2. In payment of penalties and expenses incurred in relation to the monition and sequestration.
3. In repairs of the chancel, house of residence, buildings, glebe, and demesne lands.
4. Towards satisfaction of sequestrations at the suit of creditors.
5. In the augmentation or improvement of the benefice, or the house of residence, buildings, glebe or demesne lands; or to be paid to Queen Anne's Bounty for the purposes thereof.

And in the case of sequestration for illegally trading, by stat. 1 & 2 Vict. c. 106. s. 31., no part of the profits can be paid to the suspended party, nor applied in satisfaction of a sequestration at the suit of a creditor.

By stat. 1 & 2 Vict. c. 106. s. 101., if the profits of a benefice which have come to a sequestrator during a vacancy be not sufficient to pay the stipend of the curate, the succeeding incumbent must make good so much as is deficient out of the profits of the benefice, and the bishop can enforce its payment by monition and sequestration.

Where in *Watkins v. Tartley (Clerk)* (1) it appeared, that a sequestration was issued in 1834, and that other writs had issued in the interim against the same property, the Court, in Michaelmas Term 1847, would not allow the first sequestration to be amended, by directing the bishop to levy interest upon the debt under stat. 1 & 2 Vict. c. 110. s. 17.

Where writ will not be amended to enable the bishop to levy interest upon the judgment.

The sequestrator of a benefice is bound to repair the vicarage house and buildings, and is liable for dilapidations in the bishop's court. (2)

Sequestrator bound to repair the vicarage house and buildings.

In *Hubbard v. Beckford* (3) Lord Stowell observed, "On the general principle I am inclined to hold, that the sequestrator will be liable for dilapidations. The king's writ issues to the bishop to levy a sum for the discharge of the debt. This writ has been truly described as mandatory to the bishop, who is, in a general sense, only ministerial. The sequestrator is a kind of bailiff to the bishop. There is no mention of any purpose but the payment of the particular debt; it is, however, a thing incident to, and inseparable from, the subject-matter itself, that there are certain duties and expenses for which the sequestrator is bound to provide.

Judgment of Lord Stowell in *Hubbard v. Beckford*.

"The instrument issued under the authority of the bishop, and contains a clause of allowance for all necessary charges; and I do not know on what principle it can be maintained, that the repairs of the chancel and of the parsonage are not necessary charges. The clergyman is by law equally required to provide such repairs, as well as the performance of divine service, and he cannot exonerate himself from one of those duties more than from the other. The creditor is the person to whom the sequestration is usually granted; but that is only for the convenience of the proceeding under it, and by the authority of the bishop. The sequestration might have been granted to the churchwardens, or to others; and the creditor is to act, as any other person would be bound to act, in that character; he is not to give to himself that preference, which a third person could not be compellable to allow.

"I throw out this observation, as the substance of my opinion on the

(1) 11 Jurist, 1017.

etiam *North v. Barber*, 3 ibid. 307.

(2) *Whinfield v. Watkins*, 2 Phil. 1.; vide

(3) 1 Consist. 310.

RIGHTS,
DUTIES, AND
LIABILITIES
OF SEQUESTRA-
TORS.

The expense of repairing the glebe house and premises, is prior to the demand of a creditor under a sequestration.

Judgment of Chief Baron Woulfe in *Baker v. Swayne (Clerk)*.

general question, when it shall hereafter be brought fully before the Court; and I am inclined to hold that the sequestrator will be liable for charges of this nature, as inseparable from the benefice; and that they could not be disjoined from the duties of the sequestration, even by the authority of the bishop, as observed in argument, even if he could be supposed to have sanctioned any such pretension."

The expense of keeping the glebe house and premises in repair is a charge on the moiety of the sum levied under a sequestration, at the suit of a creditor, prior to the demand of that creditor. Thus, in *Baker v. Swayne (Clerk)* (1) Chief Baron Woulfe observed, "The Court is of opinion, in this case, that the money which has been levied is to be considered as being now actually in the hands of the bishop; and that we are to apply it, as he ought to have done. We conceive that the money having been received by the bishop under a sequestration, he is at liberty to apply it in the same way as he could have compelled the incumbent to have applied it for ecclesiastical purposes. That appears to us to be the principle of the case of *Whinfield v. Watkins*. (2) Therefore, taking into consideration that the Irish act of parliament has cut down the right of the bishop in proceeding against the incumbent, and authorises him to sequester one moiety only of the profits of the benefice for the purpose of repairing the glebe, the case stands thus, that the bishop had a right in this case, by proceeding under the statute, to compel the application of a moiety of the profits of the benefice to the repair of the dilapidations; but being himself in the possession and administration of those funds, it was not necessary that he should adopt coercive measures to compel the party to do that which he himself might do without any coercion being resorted to. He might spontaneously, and without any proceedings against the incumbent, apply the receipts in the same manner as, and do that which the incumbent ought to have done. During the period the sequestrator was in possession, a considerable sum of money, over 500*l.*, has been received by the bishop. A moiety of that sum he could have compelled to be applied in repairing the dilapidations. He has brought the money into court expressly subject to its being disposed of as he ought to have applied it; and he now calls on the Court so to dispose of it. We are of opinion that he is entitled to apply, in repairing these dilapidations, out of the sum he has received as sequestrator, a sum not exceeding a moiety of the entire amount of the profits received by him. So that, without deciding whether the incumbent is liable beyond the amount specified in the Irish act of parliament, we think that the bishop's claim for dilapidations ought to be allowed, and that the report ought to be altered in that respect." (3)

(1) 1 Jones & Carey (Irish), 231.

(2) 2 Phil. 1.

(3) The Court made the following order:—"It is ordered by the Court, that the officer's report in this cause be set aside, so far as it omits to allow the Rev. J. Barton the sum of 14*l.* 18*s.* 6*d.* for dilapidation of the glebe house of Kilbrew, out of the sum lodged by the sequestrator in this cause; the said J. Barton to be entitled to the said sum of 14*l.* 18*s.* 6*d.* for the said dilapidations; and it appearing to

the Court, that the said J. Barton has been paid the sum of 50*l.* on account of same, the officer to pay over the balance to the said Rev. J. Barton, being 9*l.* 18*s.* 6*d.*; the sequestrator, on passing his account, to have credit for the said sum of 50*l.* so paid to the said Rev. J. Barton; and the residue of the sum lodged in court be paid out to the parties entitled thereto, pursuant to the officer's report. No costs of reference or motion."

It appeared in *Moore v. Ramsden (Clerk)* (1) that the defendant granted an annuity, charging it, by deed, on two ecclesiastical benefices holden by him as rector, viz. Great Stainbridge and Little Wakering, which he thereby demised on trusts to secure the annuity. He at the same time executed a warrant of attorney to the grantee, reciting the annuity deed, and stating that, for further security, the regular payment of the said annuity be thereby devised, and authorised certain attorneys, &c.; the rest of the instrument being in the common form of a warrant of attorney to suffer judgment in an action of debt. The amount for which judgment was to be entered was twice the purchase money of the annuity. There was no defeasance. It was held, that the warrant of attorney was not sold as charging the benefices contrary to stat. 13 Eliz. c. 20.

Under the authority of the above deed, the grantee sequestered the living of Little Wakering for arrears of the annuity; and afterwards, under the same authority, and to satisfy arrears of the annuity, he obtained possession, by ejectment, of the living of Great Stainbridge. The profits of Little Wakering were not sufficient to pay off the arrears for which the sequestration had issued; the profits of Great Stainbridge were sufficient, but arrears had accrued since the sequestration, and the profits of the two livings were insufficient to discharge all. It was held, that the grantee might pay the growing arrears out of the profits of Great Stainbridge, and keep up the sequestration upon Little Wakering to pay the arrears due at the time of issuing that process.

Sequestrators can claim from the ordinary a reasonable sum out of the profits, according to the trouble they have had in gathering the tithes.

And he is also to allow for the supply of the cure, what shall be convenient, relation being had to the charge and to the profits; and likewise for the maintenance of the incumbent and of his family (in case where there is an incumbent) if he has not otherwise sufficient to maintain them.

If the sequestrators refuse to deliver up their charge, they can be compelled to do so by the ecclesiastical judge; and if they delay to give an account, the judge can deliver unto the party grieved the bonds given, with a warrant of attorney to sue for the penalties thereof to his own use at the common law. (2)

Therefore, if the incumbent be not satisfied with what the sequestrators have done in the execution of this charge, his proper remedy is by application to the spiritual judge; and if he think himself aggrieved by the determination of such judge, he can appeal to a superior jurisdiction. (3)

A judgment creditor, who has obtained sequestration of a living, is entitled to an account of the surplus in the hands of a prior sequestrator, after satisfaction of the arrears and expenses due to the party obtaining the first sequestration; and the Court will not notice the existence of incumbences, which the party has not followed up with execution and made available. (4)

RIGHTS,
DUTIES, AND
LIABILITIES
OF SEQUESTRA-
TORS.

Where two livings, sequestered under a warrant of attorney, and where the profits of one were not sufficient to pay off the arrears for which the sequestration had issued, and the profits of the two livings insufficient to discharge all.

Compensation to sequestrators.

Allowance for the supply of the cure.

Sequestrators refusing to deliver up their charge.

When the incumbent is dissatisfied with what the sequestrators have done.

Judgment creditor entitled to an account of profits from a prior sequestrator.

(1) 7 A. & E. 898.

(2) Watson's Clergyman's Law, 308.

(3) *Jones v. Barrett*, Bunb. 192.

(4) *Cuddington v. Withy*, 2 Swanst. 174.

SEXTON. (1)

Defined — Appointment — Women capable of being elected, and of voting in the election of sextons — Freehold office — Possession of church keys — Sexton by virtue of his office gains a settlement — Duties of sextons — Salary — Provisions for sextons under the Church Building Acts.

Defined. The sexton, segsten, segerstane (sacrista, the keeper of the holy things belonging to the divine worship) seems to be the same with the ostiarius in the Romish church.

Appointment. The sexton is generally appointed by the parson, but by custom he may be chosen by the parishioners.

Where a sexton had been appointed by the rector, and affidavits were filed, showing a *prima facie* right in the inhabitants to elect, as well as counter affidavits to show that the right was in the rector, the Court refused a mandamus, because the evidence was not decisive in favour of the applicants. It was said, that there was another mode of trying the right by withholding the fees, or by paying them, and bringing an action to recover back the amount; besides, the office was already full by the appointment of the rector, who, by the general law, is the proper person to make it, and strong evidence would be necessary to disprove his authority. It seems likewise doubtful whether a quo warranto would lie. (2)

Women capable of being elected and of voting in the election of sextons.

In *Olive v. Ingram* (3) two questions arose: first, whether a woman was capable of being chosen sexton; and, secondly, whether women could vote in the election. As to the first, the Court seemed to have no difficulty about it, there having been many cases where offices of greater consequence had been held by women, and at that time many women held the office of sexton in London. (4)

As to the second point, though women cannot vote for members of parliament or coroners, yet the Court notwithstanding held, that this being an office that did not concern the public, or the care and inspection of the morals of the parishioners, there was no reason to exclude women who paid rates from the privilege of voting, and no usage of excluding them was stated, which might have altered the case. (5)

Freehold office. Sextons are considered by the common law to have freeholds in their offices; and therefore, if they be improperly removed, or for alleged mis-

(1) *Vide tit. MANDAMUS.*

(2) *Rex v. Stoke Damerel (Minister and Churchwardens of)*, 5 A. & E. 584.

(3) 2 Str. 1114.

(4) The authorities cited upon this point were Spelman's Gloss. 497.; the case of the governor of a workhouse, 2 Id. Raym. 1014.; the case of the keeper of a gatehouse, 3 Keb. 32. 4 Inst. 221. *Colt and Glover v. Coventry and Lichfield (Bishop of)*, Hob. 148.

It may here be observed, that Lady Parkington was returning officer for members at Aylesbury; and the Countess of Pembroke, Dorset, and Montgomery had the office of hereditary sheriff of Westmoreland, and exercised it in person, sitting with the judges on the bench during the assizes at Appleby. 1 Inst. 326. (a) is not.

(5) Ibid.

conduct, a mandamus lies to restore them (1); for though they may be punished, they cannot be deprived by ecclesiastical censures. (2)

SEXTON.

In a case where, after a contested election for the office of sexton, an application was made for a mandamus to deliver up the keys of the church to the successful candidate, Lord Ellenborough said, "Why did they not get a new key? The keys of the church are not like an emblem of office, or the like. If it is likely to prevent any breach of the peace we would grant it; but you had better get a new key." (3)

Possession of church keys.

The office of sexton, like that of parish clerk, confers a right of settlement; and if the churchyard lie in two parishes, the sexton may gain a settlement in the parish in which he resides, although no part of the church lies within that parish. Thus in *Rex v. Liverpool (Inhabitants of)* (4) Lord Kenyon observed, "There is no doubt but that part of the office of sexton consists in digging graves. This is different from that of the sacrist, which is an office scarcely known since the Reformation, except in some of the cathedrals, whose duty it is to take care of the sacred vestments. And it is clear that the office of sexton is a public office, within the meaning of stat. 3 Gul. & M. c. 11. s. 6. In this case the church-yard lies in two parishes, and the sexton gained a settlement in that in which he resided."

Sexton by virtue of his office gains a settlement.

The duty of a sexton is to keep the church clean, swept, and adorned; to open the pews; to make and fill up the graves, for the dead; and to provide, under the direction of the churchwardens, candles and necessities belonging to the church; to get the linen washed, &c.; to attend during divine service; to keep out excommunicated persons; and to prevent any disturbance in the church. (5)

Duties of sexton.

The salary of a sexton is either according to the custom of each parish, or is settled by the parish vestry. (6)

Salary of sexton.

Where two parishes were united after the fire of London, and one set of officers, elected at a joint vestry, had served for both, and the office of sexton had been filled in the same way upon nine successive vacancies, and the salary had been paid in equal proportions by both parishes, but afterwards one of the parishes claimed to elect a separate sexton, of which they had given notice to the other; in such case, that other parish cannot maintain an action for money paid to the use of the first parish for their quota of the sexton's salary, for this was paid against their express consent. Nor can the right of the sexton be tried in such case without his being a party thereto; nor can he bring his action against both parishes on a joint obligation, or against one of them only for the whole sum. (7)

Provisions have been made in the Church Building Statutes for the protection of the interests of sextons in those cases where it is found expedient to create new parishes. Thus by stat. 59 Geo. 3. c. 134. s. 10., when any parish shall be divided under that act, or under stat. 45 Geo. 3. c. 48., all fees, dues, profits, and emoluments belonging to the parish clerk or sexton respectively of any such parish, which shall thereafter arise in any district or division of any parish so divided, shall belong to and be recoverable by the

Provisions for sextons under Church Building Acts.

Stat. 59 Geo. 3. c. 134. s. 10.

(1) *Rex v. Kingscleere (Churchwardens of)*, 2 Lev. 18. *Ile's case*, 1 Vent. 153.

(2) *Vide* 5 Bac. Abr. *Mandamus* (C), 262. 1 Stephens on Parliamentary Elections, 512.

(3) *Anon.* 2 Chitt. 255.

(4) 3 T. R. 118.

(5) Shaw, Parish Law, 47.

(6) *Stokes v. Lewis*, 1 T. R. 20.

(7) *Ibid.*

clerks and sextons respectively of each division, to which they shall be assigned in like manner, and after the same rate as they were recoverable by the clerk and sexton respectively of the original parish; and the Church Building Commissioners can make compensation for any loss of fees or emoluments which any clerk or sexton may sustain by reason of such division.

SIMONY. (1)

1. DEFINED, p. 1263.

2. SIMONY BY THE CANON LAW, pp. 1263—1266.

3. SIMONY GENERALLY, pp. 1267—1269.

Right of presenting to a benefice — Induction upon a simoniacal presentment void against the presentee of the Crown — Judgment of Lord Tenterden in DOE D. WATSON (CLERK) v. FLETCHER (CLERK) — Judgment of Chief Justice De Grey in BARRETT v. GLUE — Grant of an advowson after the church is vacant — Conveyance of an advowson in fee will be illegal, if it be to effect a corrupt contract — Agreement for carrying a former simoniacal contract into effect — A sale with an agreement to resign — An agreement to present pendente lite — Sale of an advowson during the vacancy of the church — Corrupt presentation to a benefice by an usurper — When the clerk who comes in by simony, dies in possession of the church — Stat. 1 G & M. c. 16. — Where a simoniacal contract shall not prejudice — Lease bonâ fide made by simonist good.

4. SIMONY BY STATUTE, p. 1270—1276.

Stat. 31 Eliz. c. 6. — Stat. 1 G & M. c. 16. — Stat. 12 Anne, st. ii. c. 12. — Stat. 7 & 8 Geo. 4. c. 25. — Stat. 9 Geo. 4. c. 94. — Stat. 3 & 4 Vict. c. 113. — Ecclesiastical Courts have jurisdiction in simony — Enactments of stat. 31 Eliz. c. 6. ss. 5, 6, 7, 8, 9 & 10. — Construction and objects of stat. 31 Eliz. c. 6. — Donative within stat. 31 Eliz. c. 6. — Penalties under stat. 31 Eliz. c. 6. — Patron forfeits double the value of one year's profit of the benefice — Simoniacus liable to be indicted for perjury — Computation of damages for not signing a bond conditioned for the resignation of a living — In simony all are principals — When simony cannot be set up in an action for use and occupation or for compounded tithes — If a presentee bargain with his patron to forbear any suit respecting his clerical rights, it will be simony — Judgment of Lord Ellenborough in REE v. OXFORD (BISHOP OF) — Defence of occupiers or parishioners against simoniac — Disability from simony cannot be dispensed with.

5. RESIGNATION BONDS, pp. 1276—1282.

What constitutes an illegal bond — Purchase of next presentation by a father for his son — Bond given to a father to secure an annuity to his son until he obtained a living of a certain value — Bond from incumbent to reside and not to commit waste — Marriage contracts — Condition of a bond may be bad as to one party, but good as to another — Bonds within stat. 31 Eliz. c. 6. s. 8. — STAT. 12 ANNE, ST. II. C. 12. — Penalty of taking for any sum of money, &c. the next avoidance — STAT. 7 & 8 GEO. 4. C. 25. — No presentation to any spiritual office made before April 9. 1827, shall be void on account of any agreement to resign, when another person specially named shall become qualified to take the same — Persons making any such agreement not subject to any penalty on account thereof — All such engagements entered into before April 9. 1827, to be valid and effectual in law — Engagements not bonâ fide made with such intent — If the person so specially named be not presented to such spiritual office within six months, the resignation shall be void — STAT. 9 GEO. 4. C. 94. — Engagements between certain parties entered into

(1) *Vide tit. ADVOWSON — LAPSE — PRESENTATION — PRIVILEGES AND RESTRAINTS OF THE CLERGY — QUARE IMPEDIE.*

for the resignation of any benefice, upon notice or request, to be valid — No presentation to any spiritual office will be void by reason of such agreement to resign — Persons making such agreement not to be liable to penalty — Such presentations to be valid — Not to extend to any engagements, unless the deed be deposited within two months with the registrar of the diocese or peculiar jurisdiction wherein the benefice is situated — Deed to be open to inspection, and a certified copy to be admitted as evidence — Fees to registrar — Resignation to state the engagement, and name of person for whom made — Resignation to be void, unless the person be presented within six months — Presentations made by the Crown excepted — STAT. 3 & 4 VICT. c. 113. s. 42. — Spiritual person not to sell or assign any right of patronage.

1. DEFINED.

DEFINED.

Simony (1) is the corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward ; and it may be here observed, that the words “ecclesiastical benefice” comprehend every ecclesiastical dignity and promotion.

In *Stock v. Eagle* (2) Chief Justice De Grey observed, “Simony as such was unknown to the common law, though I agree with my brother Glyn that corrupt presentation was. (3) But what is or is not simony now depends on the statute of the 31 Eliz. c. 6., which did not adopt all the wild notions of the canon law ; but has defined it to be a corrupt agreement to present. In Co. Entries, 516., it is expressed *simoniace et corrupte* ; but the latter is the legal and effective word.”

Judgment of
Chief Justice
De Grey in
Stock v. Eagle

Ayliffe (4) thus defines simony :—“Simony, according to the canonists, is defined to be a deliberate act, or a premeditated will and desire of selling such things as are spiritual, or of any thing annexed unto spirituals, by giving something of a temporal nature for the purchase thereof ; or, in other terms, it is defined to be a commutation of a thing spiritual, or annexed unto spirituals, by giving something that is temporal.”

In Godolphin (5) it is stated, that “the contracts which are commonly held corrupt and simoniacal, may be diversified almost into as many kinds as transferences and proprietary negotiations are capable of ; but those which have been most in practice (as appears by the cases reported in the law) have been by way of unlawful purchasing the next advowson, by exchange, by resignation, bonds by matrimonial compacts, by contracts remote and concealed from the presentee, by obligations of an indirect nature, and the like.”

2. SIMONY BY THE CANON LAW.

SIMONY BY
CANON LAW

Simony, by the canon law, is a very grievous offence ; and is so much the more odious, because, as Sir Edward Coke observes (6), it is ever accompanied with perjury ; for the presentee is sworn to have committed no simony.

From the commencement of the Christian era simony has been stigmatised as the greatest of offences, denounced as such by all the memorable

(1) *Vide* stat. 31 Eliz. c. 6. — Stephens' Ecclesiastical Statutes, 447—460. *in not.*

(2) 2 Black. (Sir W.), 1054.

(3) Burnet's Past. Care, 22.

(4) Parergon Juris, 496.

(5) Repertorium, 539.

(6) 3 Inst. 156.

**SIMONY BY THE
CANON LAW.**

councils of the church, and treated in the body of the canon law as a crime in comparison of which all other crimes sink into insignificance — *pro nihilo æstimanda sunt.*

Alexander II.

Alexander II., who occupied the papal chair in the middle of the eleventh century, applied the provisions of the second canon of the Council of Chalcedon to those who trafficked in the purchase and sale of benefices; and his epistle to the clergy and people of Lucca is to be found in the body of the canon law in the Epistles of Gratian (1): — “*Si quis divinorum præceptorum et animarum salutis immemor, beneficium ecclesiæ iniqua cupiditate ductus vendere vel emere temerario ausu præsumpserit, sicut in Chalcedonensi Consilio definitum est, gradûs sui periculo, eum subjacere decernimus, nec ministrare possit ecclesiæ quam pecuniâ venalem fieri concupivit.*”

Cœlestus II.

Cœlestus II., who was pope in the twelfth century, lays down the law in these words:—“*Si quis in ecclesiâ ordinationem vel promotionem per pecuniam acquisiverit, acquisitâ prorsus careat dignitate.*” And in the *Extravagantes* (2) we find, “*Qui dignitates ecclesiasticas simoniacè acquisiverit; illis sit ipso jure privatus et in futurum inhabilis ad eas et quamvis alias obtinendas.*” . . . “*Qui quomodolibet simoniam commiserit dando vel recipiendo ordines vel beneficiorum præsentationes excommunicatus habeatur.*”

**Third Council
of Lateran.**

The eighth article of the third Council of Lateran forbids even the gift or promise of the next presentation to any ecclesiastical benefice. It is headed thus: “*Ne ecclesiastica beneficia alicui promittantur antequam vacent.*” And then proceeds to enact: “*Nulla ecclesiastica ministeria seu etiam beneficia, vel ecclesiæ; alicui tribuantur seu promittantur antequam vacent.*”

It is therefore clear that by the canon law the purchase or sale of the reversion of a benefice, or a dignity, was simoniacal; because, “*cum enim execranda simonia sit episcopatum vendi, similiter æstimandum de ceteris beneficiis, quæ veluti membra et portiones quædam sunt episcopatus.*”

**Ordinance of
Archbishop
Langton.**

By an ordinance of Archbishop Langton it was strictly forbidden that any man should resign his church, and then accept the vicarage of the same church from his own substitute, because, in this case, some unlawful bargain may be well suspected; and “*if any shall presume to do contrary hereunto, the one shall be deprived of his vicarage, and the other of his parsonage.*” (3)

**Why a vicarage
was preferred
to a rectory.**

It may seem strange, that any one should choose to be a vicar rather than rector; but the cause may be thus explained: the Lateran Council under Innocent III. had forbidden the holding two churches, that is, two rectories, but not two vicarages, or a rectory and a vicarage. For though the Lateran canon against pluralities had not then been put in execution in England, yet the clergy were apprehensive it would soon be done.

It was decreed by Archbishop Wethershead, that “*It shall not be lawful to any man to transfer a church to another in the name of a portion (4), or take any money or covenanted gain for the presentation of any one; and if any should be found guilty hereof, by conviction or confession, we do*

(1) *X. Cause 1. qu. 3. c. 9.*

(2) *Extr. Pauli II.*

(3) *Lyndwood, Prov. Const. Ang. 107.*

(4) *In the name of a portion: — That is as a portion from a father or grandfather to his son or grandson.*

decree, by the king's authority (1) and our own, that he shall for ever be deprived of the patronage (2) of that church." (3)

SIMONY BY THE
CANON LAW.

By a constitution of Othobon, after reciting "we understand that it frequently happeneth that when a presentation is to be made to a vacant church, he who is to be presented first maketh a bargain with the patron for a certain sum to be paid to him yearly out of the profits of the church, and he who hath made such contract is presented to the church; we, intending to provide against this act of simony and detriment to the church," utterly revoke "all pensions heretofore imposed on parish churches, unless they who have or receive the same are warranted from the beginning by lawful prescription, or special privilege, or other certain right." (4)

Neither was this canon, states Sir Simon Degge (5), of better effect than the other as to the making contracts void, which were only determinable at the common law, where this canon could not be pleaded in bar. But there were some general canons of the church of greater force, whereby a person simoniacally promoted was punished by deprivation; and a simoniac by deprivation and perpetual disability, not only as to the church he was presented to upon a simoniacal contract, but also as to all others. (6)

By a canon of Archbishop Langton it was ordained: "We do decree that the bishop (7) shall take an oath of him who shall be presented, that for such presentation he neither promised (8) nor gave (9) any thing to the person presenting him (10), nor made any agreement with him for the same, especially if the presentee be probably suspected of the same." (11)

And by canon 40., "to avoid the detestable sin of simony, because buying and selling of spiritual and ecclesiastical functions, offices, promotions, dignities, and livings is execrable before God; therefore the archbishop and all and every bishop or bishops, or any other person or persons having authority to admit, institute, collate, instal, or to confirm the election of any archbishop, bishop, or other person or persons, to any spiritual or ecclesiastical function, dignity, promotion, title, office, jurisdiction, place, or benefice with cure or without cure, or to any ecclesiastical living whatsoever, shall, before every such admission, institution, collation, installation or confirmation of election, respectively minister to every person hereafter to be admitted, instituted, collated, installed, or confirmed, in or to any archbishopric, bishopric, or other spiritual or ecclesiastical function, dignity,

Canon 40.
An oath
against simony
at institution
into benefices.

(1) *We do decree by the king's authority*:—The King of England has *de facto* cognisance in causes of the right of patronage, which this constitution takes notice of as such.

(2) *Shall for ever be deprived of the patronage*:—Which seems to be intended during his life, and not to extend to his heirs after him, so as to punish them for their father's or other ancestor's crime.

Sir Simon Degge (P. C. by Ellis, 44.) justly observes, that a canon is not sufficient to deprive a man of his freehold or inheritance; and that this canon was never put in execution.

(3) Lyndwood, Prov. Const. Ang. 281.

(4) Athon, 135.

(5) P. 1. c. 5.

(6) Ibid.

(7) *Bishop*:—Or other ordinary who had power to grant institution.

(8) *He neither promised*:—By word or other stipulation.

(9) *Nor gave*:—Either by exchange or recompense, or confirmation of what had been given before, or by bequest, or remission.

(10) *To the person presenting him*:—And if he promise anything to another, although it be not to him who had the presentation, yet if it be so that he shall not otherwise have the benefice, this also is simony.

(11) *Vide* Lyndwood, Prov. Const. Ang. 108, 109.

**SIMONY BY THE
CANON LAW.**

promotion, title, office, jurisdiction, place, or benefice with cure or without cure, or in or to any ecclesiastical living whatsoever, this oath, in manner and form following; the same to be taken by every one whom it concerneth, in his own person, and not by a proctor:—

“ I, N. N., do swear, that I have made no simoniacal payment, contract, or promise, directly or indirectly, by myself, or by any other to my knowledge or with my consent, to any person or persons whatsoever, for or concerning the procuring and obtaining of this ecclesiastical dignity, place, preferment, office, or living [respectively and particularly, naming the same, whereunto he is to be admitted, instituted, collated, installed, or confirmed], nor will at any time hereafter perform or satisfy any such kind of payment, contract, or promise, made by any other without my knowledge or consent. So help me God through Jesus Christ.”

And this oath, whether interpreted by the plain tenor of it, or according to the language of former oaths, or the notions of the Catholic Church concerning simony, is against all promises whatsoever. (1)

Therefore, if a person be not within stat. 31 Eliz. c. 6. by promising money, reward, gift, profit, or benefit, yet he becomes guilty of perjury, if he take this oath after any promise.

In *Rex v. Lewis* (2) an information was moved for against a clergyman for perjury at his admission to a living, upon an affidavit that the presentation was simoniacal. But the Court refused to grant it, before he had been convicted of the simony.

A clerk can consistently and conscientiously take the oath against simony, although he may have given his money towards the building of the church before consecration; because, until a church is consecrated, it is not an ecclesiastical living, or benefice, having cure of souls.

By stat. 13 Car. 2. c. 12. s. 4. “ it shall not be lawful for any archbishop, bishop, vicar-general, chancellor, commissary, or any other spiritual or ecclesiastical judge, officer, or minister, or any other person, having or exercising spiritual or ecclesiastical jurisdiction, to tender or administer unto any person whatsoever the oath usually called the oath *ex officio*, or any other oath whereby such person to whom the same is tendered or administered, may be charged or compelled to confess, or accuse, or to purge him or herself of any criminal matter or thing, whereby he or she may be liable to censure or punishment, any thing in this statute or any other law, custom, or usage heretofore to the contrary hereof in any wise notwithstanding.”

Dr. Watson (3) queries whether the oath against simony be not abolished with the oath *ex officio*; but there seems to be no foundation for such a doubt. And the contrary doctrine is the general practice, especially as the makers of the statute which repealed the oath *ex officio* do not seem to have had any intention of interfering with the oath against simony.

Subscribing towards the building of a church before its consecration, does not prevent the subscriber from taking the oath against simony.

Stat. 13 Car. 2. c. 12. s. 4.
Abolishing the oath *ex officio*.

The oath against simony under canon 40. not abolished with the oath *ex officio*.

(1) Gibson's Codex, 802.

(2) 1 Str. 70.

(3) P. 154.

3. SIMONY GENERALLY.

SIMONY
GENERALLY.

Right of presenting to a benefice.

The patronage, or the right of presenting to a benefice, is a property or estate, capable of being conveyed in fee, for life, for years, for any number of turns, or for the next turn only, whilst the church is full; but when it is empty, it is incapable of being conveyed (1), because it is like the rent of an estate, become in arrear, which is a chose in action, and cannot be assigned. But the church is full as long as the incumbent is alive, and is equally so whilst he is in extremis, as in full health.

The patron, therefore, of a living may be changed at any time till the last moment of the existence of an incumbent, and a new patron substituted; and neither the common or statute law imposes any restriction in this respect on lay patrons. (2)

Induction upon a simoniacal presentment is void against the presentee of the Crown, who upon being inducted may maintain ejectment against the person simoniacally presented. (3) Thus in *Doe d. Watson (Clerk) v. Fletcher (Clerk)* (4) Lord Tenterden observed, "The lessor of the plaintiff had been presented, instituted, and inducted. He was, therefore, put into corporeal possession of the church, with the rights thereto belonging, and ejectment therefore was maintainable. Quare impedit is the proper remedy where the church is full; but here the church was void, because the presentation, institution, and induction of Mr. Fletcher having been made in consideration of the resignation bond, which was simoniacal, were void by the stat. 31 Eliz. c. 6., and the right for that turn belonged to the king. The church, therefore, was not full at the time when the lessee of the plaintiff was presented."

Induction upon a simoniacal presentment void against the presentee of the Crown.

Judgment of Lord Tenterden in *Doe d. Watson (Clerk) v. Fletcher (Clerk)*.

In *Barret v. Glubb* (5) Chief Justice de Grey observed, "An advowson is a temporal right, not indeed jus habendi, but jus disponendi. The exercise of that right is by presentation. The right itself is a valuable right, and therefore an advowson is held to be assets in case of lineal warranty. (6) It is real assets in the hands of the heir (7), and the trustee or mortgagee of an advowson are bound to present the clerk of the cestuique trust or mortgagor. Thus far it is a valuable right, and properly the object of sale.

An advowson is a temporal right.

Judgment of Chief Justice De Grey in *Barret v. Glubb*.

"But the exercise of this right is a public trust, and therefore ought to be void of any pecuniary consideration, either in the patron or presentee. It cannot, it ought not, to produce any profit. It is not vested in guardian in socage, nor is he accountable for any presentation made during the infancy of his ward. It is held in Hob. 304. that an advowson will not pass by the words commodities, emoluments, profits, and advantages. In quare impedit the patron could, at common law, recover no damages, In writ of advowson he must lay the explees in the parson."

(1) *Baker v. Rogers*, Cro. Eliz. 789.
Brookesby v. Wickham, 1 Leon. 167.

(2) *Fux v. Chester (Bishop of)* (in error),
1 D. & C., 416. 3 Bligh, N. S. 123.
6 Bing. 1., overruling S. C. 4 D. & R. 93.
2 B. & C. 635.

(3) *Doe d. Watson (Clerk) v. Fletcher (Clerk)*, 2 M. & R. 206. 8 B. & C. 25.

(4) Ibid.

(5) 2 Black. (Sir W.), 1053.

(6) Doddr. 2. 23.

(7) *Robinson and Tonge*, Dom. Proc. 1730.

SIMONY
GENERALLY.

Grant of an advowson after the church is vacant.

Conveyance of an advowson in fee will be illegal, if it be to effect a corrupt contract.

Agreement for carrying a former simoniacal contract into effect.

A sale with an agreement to resign.

An agreement to present pendente lite.

Sale of an advowson during the vacancy of the church.

A grant of an advowson after the church is actually vacant is void, but no lapse incurs till after induction to a second benefice. (1)

It has been said, that the statutes against simony contain no express provisions for avoiding simoniacal conveyances; but there can be no doubt that the conveyance even of an advowson in fee, which is in itself perfectly legal, if it be made for the purpose of carrying a corrupt contract into execution, is void; at least as to so much as goes to effectuate that purpose, and if the sound part cannot be separated from the bad part, it is void altogether. (2)

An agreement for carrying a former simoniacal contract into effect is not necessarily also simoniacal and void. (3)

A., the incumbent of a living and owner of the advowson, agreed with B. for the sale of the advowson, and for the immediate resignation of the living, and accordingly tendered his resignation to the bishop, who refused to accept it: upon which another agreement was entered into between the same parties, for the sale of the advowson only, without any contract for the resignation, and at the same time, by a separate agreement, A. granted a lease of the tithes and profits to B. for ninety-nine years, if A. should so long live, under which lease B. received the profits till A.'s death, and on A.'s death the Crown presented for that turn only, by reason of simony. The incumbent presented by the Crown died, whereupon B. claimed the right to present. It was objected by A.'s heir, that the second contract for the sale of the advowson, and the lease of the tithes of the same date, being for the purpose of carrying the former simoniacal contract into effect, was also simoniacal and void: — But it was held, that whether the second agreement was simoniacal or not, the illegality, if any, extended to the next presentation only; and that, therefore, the Crown having presented for one turn, B. had a good title to the advowson, and had a right to present on the present vacancy. (4)

A sale, with an agreement to resign, would be simoniacal; because the church would be full in name and form only, but vacant in substance and reality. (5) So also an agreement to present pendente lite, where the incumbent was in by usurpation, is simoniacal. (6)

The sale of an advowson, whilst the church is actually vacant, is only void quoad the fallen vacancy. (7) Such a purchase is good for every purpose, except for presenting to the existing vacancy, for the statutes against simony apply only to a presentation procured or intended to be procured. (8) The purchase of a void turn is not only void at common law, but simoniacal. (9)

(1) *Salisbury (Bishop of) v. Wolferstan*, 3 Burr. 1501. *Wolferstan v. Lincoln (Bishop of)*, 2 Wils. 174. S. C. nom. *Lincoln (Bishop of) v. Wolferstan*, 1 Black. (S. r. W.), 440.

(2) *Grey v. Hasketh*, Ambbl. 268. *Barret v. Glubb*, 2 Black. (Sir W.), 1052.

(3) *Greenwood v. London (Bishop of)*, 1 Marsh. 292. 5 Taunt. 727.

(4) *Ibid.*

(5) *Fox v. Chester*, 2 B. & C. 635.

(6) *Walker v. Hammensly*, 3 Lev. 116. Skin. 90.

(7) *Lincoln (Bishop of) v. Wolferstan*, 5 Burr. 1510. 1 Dyer, 282. (b). *Digby v. Fitch*, 1 Brownl. & Goulds. 167. F. N. B. 33. (P). *Rennell v. Lincoln (Bishop of)*, 7 B. & C. 118.

(8) *Greenwood v. London (Bishop of)*, 5 Taunt. 745. *Hill (Clerk) v. Exeter (Bishop of)*, 2 *ibid.* (9). *Dyer*, 129. (b). *Lincoln (Bishop of) v. Wolferstan*, 3 Burr. 1512.

(9) *Laker v. Rogers*, Cro. Eliz. 789.

If a man present by usurpation to a benefice, by reason of any corrupt contract, &c., the presentation is void. But if there be a presentation by usurpation, the rightful patron, and not the Crown, must present, for otherwise every rightful patron might lose his presentation. (1)

If a clerk, who came in by simony, die in possession of the church, the Crown will not thereby lose its right to present for simony, for the statute makes the presentation, admission, and institution void, so that the church was never full of an incumbent, and *nullum tempus occurrit regi*. But if the Crown suffer the patron, or any one else to usurp, and present a second clerk, who is instituted and inducted, and who subsequently dies incumbent, then the Crown loses the presentment; and it seems if the incumbent resign, or be deprived, the church having once been full (2), the Crown would also lose the presentation.

The doctrine, that the Crown might present after death, because the church, notwithstanding the institution and induction, remained void (3), was considered hard, and especially that an innocent successor to a simoniacal incumbent should be disturbed in his possession by the power of the Crown; and therefore stat. 1 Gul. & M. c. 16. was passed, which, after reciting it had often happened, that persons simoniac or simoniacally promoted to benefices or ecclesiastical livings had enjoyed the benefit of such livings many years, and sometimes all their lifetime, by reason of the secret carriage of such simoniacal dealing; and that after the death of such simoniac person, another person innocent of such crime, and worthy of such preferment, being presented or promoted by another patron innocent also of that simoniacal contract, had been troubled and removed upon pretence of lapse (or otherwise) to the prejudice of the innocent patron in reversion, and of his clerk, whereby the guilty went away with the profit of his crime and the innocent succeeding patron and his clerk were punished, contrary to all reason and good conscience, enacts by section 2. that, after the death of the person so simoniacally promoted, the offence or contract of simony shall, neither by way of title in pleading, or in evidence to a jury, or otherwise, be alleged or pleaded to the prejudice of any other patron innocent of simony, or of his clerk by him presented or promoted, upon pretence of lapse to the Crown, metropolitan, or otherwise, unless the person simoniac or simoniacally presented, or his patron, have been convicted of such offence at the common law, or by some ecclesiastical court, in the lifetime of the person simoniac or simoniacally promoted or presented.

And by section 3. no lease, really and *bonâ fide* made, by any such person, simoniac or simoniacally promoted to any deanery, prebend, or parsonage, or other ecclesiastical benefice or dignity, for good and valuable consideration, to any tenant or person not being privy unto, or having notice of, such simony, shall be impeached or avoided for or by reason of such simony.

SIMONY GENERALLY.

Corrupt presentation to a benefice by an usurper.

When the clerk who comes in by simony, dies in possession of the church.

Stat. 1 Gul. & M. c. 16. ss. 1 & 2.

Where a simoniacal contract shall not prejudice.

Stat. 1 Gul. & M. c. 16. s. 3. Lease *bonâ fide* made by simonist good.

(1) 1 Inst. 120. (a). 3 Ibid. 153. *Winchcombe v. Winchester* (Bishop of), 11eb. 167. Godolphin's Repertorium, 542.

(2) Degge's P. C. by Ellis, 49. *Winchcombe v. Winchester* (Bishop of), 11eb. 166.

(3) Ibid. 1 Brownl. 164.

SIMONY BY
STATUTE.

4. SIMONY BY STATUTE. (1)

Simony was not an offence punishable in a criminal way at the common law (2), it being thought sufficient to leave the clerk to ecclesiastical censures. But as these did not affect the simoniacal patron, nor were efficacious enough to repel the notorious practice of the thing, divers acts of parliament have been made to restrain it by means of civil forfeitures.

Principal statutes relating to simony.

Ecclesiastical Courts have jurisdiction in simony.

Stat. 31 Eliz. c. 6. s. 5.

The penalty for presenting to a benefice, or for being presented for reward.

The principal statutes relating to simony are stat. 31 Eliz. c. 6. (3), stat. 1 Gul. & M. c. 16. (4), stat. 12 Anne, st. ii. c. 12. (5), stat. 7 & 8 Geo. 4. c. 25. (6), stat. 9 Geo. 4. c. 94. (7), and stat. 3 & 4 Vict. c. 113. (8)

By these statutes, however, the ancient ecclesiastical laws against simony, and the power of the Ecclesiastical Court in the execution of those laws, so far from being superseded or abrogated, are thereby expressly confirmed (9); and, therefore, the Ecclesiastical Court can proceed against a simonist (10) *pro salute animæ*, and upon examination and evidence deprive him for that cause, although he was not privy to the contract, because there are no accessories in simony. (11)

By stat. 31 Eliz. c. 6. s. 5., if any person, or body politic and corporate, for any sum of money, reward, gift, profit, or benefit, directly, or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurances, of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same, for or in respect of any such corrupt cause or consideration — every such presentation, collation, gift, and bestowing, and every admission, institution, investiture, and induc-

(1) *Vide* tit. RESIGNATION BONDS, *post*, 1276.

(2) *Adams v. Lambert*, Moore (Sir F.), 654.

(3) *Vide* Stephens' Ecclesiastical Statutes, 417—460. *in not.*

(4) *Ibid.* 683.; *ante*, 1269.

(5) *Ibid.* 710.

(6) *Ibid.* 1353.

(7) *Ibid.* 1400.

(8) *Ibid.* 2110.

(9) Gibson's Codex, 801.

(10) *Dobie v. Masters*, 3 Phil. 171.

(11) Watson's Clergyman's Law, 43.

Simony, on the part of a presentee to a living, being in law a very odious offence, and the consequences of conviction thereof highly penal, the law, even if a simoniacal agreement be established, requires the strictest proof of the presentee's privy thereto before induction, or of his confirmation thereof after; so, in proof that a clerk is simoniac promotus, a corrupt agreement must be no less conclusively shown. In a criminal suit against a clerk for simony and

for being simoniacally promoted, the Court holding, 1st. that neither his privy to, nor confirmation of, any simoniacal contract was proved; 2dly, that no criminal contract was established, dismissed him from the suit, and condemned the promoters in costs; and it seems, that when a clerk is simoniac promotus without his privy or subsequent confirmation, the Ecclesiastical Court cannot proceed to a sentence of deprivation in a criminal suit. *Whish v. Hesse* (Clerk), 5 Hagg. 659.

Quære, Whether acts subsequent to induction in confirmation of a simoniacal agreement, made without the knowledge of the presentee, amount to simony on his part? *Ibid.* 696.

It may be here observed, that in simony the improbability of evidence is not sufficient to discredit a witness of good general character, speaking firmly and solemnly, unless such improbability amounts almost to absolute incredibility, and be incapable of explanation. *Per* Sir John Nicholl, *ibid.* 706.

tion thereupon, will be utterly void, frustrate, and of none effect in law. And the queen can present, collate unto, or give or bestow every such benefice, dignity, prebend, and living ecclesiastical, for that one time or turn only; and every person, or bodies politic and corporate, that give or take any such sum of money, reward, gift, or benefit, directly or indirectly, or that take or make any such promise, grant, bond, covenant, or other assurance, will forfeit the double value of one year's profit of every such benefice, dignity, prebend, and living ecclesiastical; and the person so corruptly taking, procuring, seeking, or accepting any such benefice, dignity, prebend, or living, will thereupon and from thenceforth be adjudged a disabled person in law to have or enjoy the same benefice, dignity, prebend, or living ecclesiastical.

By sect. 6., if any person for any sum of money, reward, gift, profit, or commodity whatsoever, directly or indirectly, other than for usual and lawful fees, or for or by reason of any promise, agreement, grant, covenant, bond, or other assurance, of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, admit, institute, instal, induct, invest, or place any person in or to any benefice with cure of souls, dignity, prebend, or other living ecclesiastical — every such person so offending will forfeit and lose the double value of one year's profit of every such benefice, dignity, prebend, and living ecclesiastical; and immediately from and after the investing, installation, or induction thereof had, the same benefice, dignity, prebend, and livings ecclesiastical will be eftsoons merely void; and the patron or person to whom the advowson, gift, presentation, or collation by law appertains, can present or collate unto, give, and dispose of the same benefice, dignity, prebend, or living ecclesiastical, as if the party so admitted, instituted, installed, invested, inducted, or placed, had been or were naturally dead.

By sect. 7., no title to confer or present by lapse can accrue upon any avoidance mentioned in the act, but after six months next after notice given of such avoidance, by the ordinary to the patron.

By sect. 8., if the incumbent of any benefice with cure of souls, corruptly resign or exchange the same, or corruptly take for or in respect of the resigning or exchanging of the same, directly or indirectly, any pension, sum of money or benefit whatsoever, the giver and the taker of any such pension, sum of money, or other benefit corruptly, will lose double the value of the sum so given, taken, or had; the one moiety as well thereof as of the forfeiture of double value of one year's profit before mentioned to be to the queen, and the other moiety to him or them that will sue for the same, by action of debt, bill, or information, in any of her majesty's courts of record, in which no essoin, protection, or wager of law or privilege shall be admitted or allowed.

By sect. 9., nothing in the act is in any wise to extend to take away or restrain any punishment, pain, or penalty limited, prescribed, or instituted by the laws ecclesiastical, for any of the offences in the act mentioned.

By sect. 10., if any person receive or take any money, fee, reward, or any other profit, directly or indirectly, or take any promise, agreement, covenant, bond, or other assurance, to receive or have any money, fee, reward, or any other profit, directly or indirectly. all ordinary and lawful

SIMONY BY
STATUTE.

Stat. 31 Eliz.
c. 6. ss. 6—10.

Sect. 6.
The penalty for presenting or collating, or for being presented to a benefice with cure, for reward.

Sect. 7.
No title to confer by lapse, but after six months' notice.

Sect. 8.
The penalty for corrupt resigning or exchanging of a benefice with cure of souls.

Sect. 9.
Penalties inflicted by the ecclesiastical law are not taken away by this statute.

Sect. 10.
The penalty for

SIMONY BY
STATUTE.

giving or taking
of rewards to
make ministers,
or to give
licence to
preach.

Who shall have
the forfeitures,
and by what
means.

Construction
and objects of
stat. 31 Eliz.
c. 6.

fees only excepted, for or to procure the ordaining or making of any minister, or giving any orders, or licence to preach; every person so offending will for every such offence forfeit the sum of 40*l.*; and the party so corruptly ordained or made minister, or taking orders, will forfeit the sum of 10*l.*; and if, at any time within seven years next after such corrupt entering into the ministry, or receiving of orders, he accept or take any benefice, living, or promotion ecclesiastical, that then immediately from and after the induction, investing, or installation thereof or thereunto had, the same benefice, living, or promotion ecclesiastical will be eftsoons merely void; and the patron or person to whom the advowson, gift, presentation or collation appertains, can present or collate unto, give, and dispose of the same benefice, living, or promotion ecclesiastical in such sort, to all intents and purposes, as if the party so inducted, invested, or installed had been or were naturally dead: the one moiety of all which forfeitures will belong to the queen, and the other moiety to him that will sue for the same, by action of debt, bill, plaint, or information.

Stat. 31 Eliz. c. 6. is a penal statute, and consequently must be construed strictly, and cannot be extended by a supposed equity.

This statute is the best exposition of what is or is not simony, and which is not privative of the jurisdiction of the church; but, as Bishop Wake calls it, cumulative, leaving the church all the authority it had before. The statute renders what was before voidable void, enacting penalties on certain acts, and making the presentation, admission, institution, and induction void, instead of being voidable by deprivation as they were before the statute (1); the intent of which was to eradicate all manner of simonies (2), to make presentations spontaneous, to inflict punishment upon the patron as the author of the corruption by the loss of his presentation, and upon the incumbent who comes in by such a corrupt patron, and corruptly takes the benefice by the loss of his incumbency (3), and disabling him from ever again enjoying the same benefice for which the contract was made. (4)

The taking or giving above the usual fees is, under stat. 31 Eliz. c. 6. s. 6., as dangerous to the clerk as to the officer, for the church will be void, so that the patron that has the right to present can present again; and the usurper and officer who takes more than his fees, forfeits double the value of the profits of the benefice for a year according to its actual value. But in this clause no disability rests upon the incumbent, but that he may, by the true patron, be presented again, nor does lapse incur till after six months' notice from the bishop. (5) It is not that the church shall be *ipso facto* void, or that the institution shall be void, but that it shall be "eftsoons" void, and that the patron shall present, as if the person were naturally dead. It therefore seems that if the church be full by the institution and induction, doubts may arise whether the church will be void *ipso facto*, or whether it must be avoided by an ecclesiastical sentence of

(1) 1 Inst. 120. (a). *Winchcombe v. Winchester (Bishop of)*, 110*b.* 167. *Windsor's case*, 5 Co. 102. *Barret v. Glubb*, 2 Black. (Sir W.), 1052.

(2) *Kitchin v. Culvert*, Lane, 100.

(3) *Hutchinson's (Dr.) case*, 12 Co. 102.

(4) *Geoffrey Booth v. Potter*, Cro. Jac. 533. 3 Inst. 154.

(5) Degge's P. C. by Ellis, 51.

deprivation. But it seems, that the patron may present immediately without any sentence ecclesiastical. (1)

Donatives are said not to be within the words of the statute, but they are within its object and meaning: thus, an agreement to pay 20*l.* for one of the royal donatives is simony. (2)

It seems that, under stat. 31 Eliz. c. 6., the proportion of double value is incurred by the corrupt contract only, but the presentation is not forfeited to the crown, unless the clerk be *de facto* presented, or collated upon such contract; but if the presentation have been made, it has been held to be void, although the clerk presented be not privy to the simony. (3)

So there may be simony, and neither clerk or patron privy to it, and yet the turn is given to the Queen by stat. 31 Eliz. c. 6. (4) But in such a case the clerk is not liable to any forfeiture, nor within the clause of disability in the statute (5), except so far as it goes to prevent him from being presented to the same benefice again, being only disabled quoad hanc ecclesiam (6); and the Queen, even coming in by her title by the simony, cannot present him. (7)

So, also, if money be given by a clerk to present him to a benefice, although the money be not paid to the patron, who has no knowledge of it, yet the incumbent will be deprived, and the patron lose his turn. (8) So where an incumbent makes an agreement with the wife or friend of the patron, who is personally ignorant of the transaction, yet if a presentation be made upon that agreement it is simoniacal and void. (9)

But if the clerk be neither party nor privy to the contract, and neither takes nor accepts the benefice upon the corrupt contract, he is not disabled from enjoying the same under a new presentation from the king, as though the presentation, admission, and induction are all void within the letter, yet they are not within the clause of disability of the statute. (10)

And this agrees with the canon law: *Aliquis est in prelatum alicujus ecclesiæ electus per simoniam eo tamen ignorante nec ratum habente; talis electio propterea reprobata est, quæritur utrum episcopus, cum illo poterit dispensare ut iterum ad eandem prelaturam elegatur. Respondetur, quod episcopus illa vice cum illo dispensare non potest, sed cum illo qui igno-
ranter simplex beneficium per simoniam est adeptus post liberam resignationem potest episcopus dispensare.* (11)

As to the punishment of the patron, whether he is an usurper or other corrupt contractor, or person corruptly taking, procuring, or accepting the benefice, he forfeits the double value of one year's profit of the benefice which is to be accounted according to the true value, as the same may be

SIMONY BY
STATUTE.

Donative
within stat. 31
Eliz. c. 6.

PENALTIES UN-
DER STAT. 31
ELIZ. C. 6.

Patron forfeits
double the
value of one
year's profit of
the benefice.

(1) *Vide* 3 Inst. 154.

(2) *Bawderok v. Mackaller*, Cro. Car. 331.

(3) Degge's P. C. by Ellis, 49. Godolphin's Repertorium, 542. *Baker v. Rogers*, Cro. Eliz. 788. *Rex v. Norwich (Bishop of)*, Cro. Jac. 385. *Booth v. Potter*, *ibid.* 533. *Fox v. Chester (Bishop of)*, 2 B. & C. 659. 6 Bing. 1.

(4) Degge's P. C. by Ellis, 50.

(5) 3 Inst. 154.

(6) *Booth v. Potter*, Cro. Jac. 533.

(7) 1 Inst. 120. (a).

(8) *Boyer (Sir W.) v. High Commission Court*, 2 Bulst. 182.

(9) *Rex v. Norwich (Bishop of)*, Cro. Jac. 385. *Calvert v. Kitchin*, Lane, 73. *Byrte v. Manning*, Cro. Car. 426.

(10) Degge's P. C. by Ellis, 48—50. 3 Inst. 154. *Hutchinson's (Dr.) case*, 12 Co. 101; *sed vide Whish v. Hesse*, 3 Hagg. 659.

(11) St. Gregory's Decretals, lib. 1. tit. 7. c. 59. 210.

SIMONY BY
STATUTE.

demised, and be tried by a jury, but not according to the old valuations and taxations of the church in the king's books and First Fruits Office (1); and it has been said, that this double value is also forfeited when a simoniacal contract is made by a clerk or other person, even if the patron afterwards present the clerk gratis. (2) The forfeitures must be sued for in the Courts of Chancery, King's Bench, Common Pleas, or Exchequer, and not in any inferior Court of Record. (3)

Simoniacus
liable to be in-
dicted for per-
jury.

In addition to these forfeitures and disabilities, the simoniacus is also liable to be indicted and punished, as in other cases of perjury. However, where an information was moved for against a clergyman for perjury, at his admission to a living, on an affidavit that the presentation was simoniacal, the Court refused to grant it, until he had been convicted of the simony. (4)

Computation
of damages for
not signing a
bond condi-
tioned for the
resignation of
a living.

In *Sondes (Lord) v. Fletcher* (5) it was held, that where a bond was conditioned for the resignation of a living, which the defendant when requested had refused to sign, it was held, that being a wrong doer, the jury were not bound in assessing the damages, to confine themselves to the diminution of the value of the advowson to the plaintiff by the defendant's life interest, nor in estimating the annual proceeds to deduct the curate's stipend.

In simony all
are principals.

In simony all are principals (6); every person as well as the Crown may take advantage of simony; and therefore, if parson, vicar, or other dignified person bring an action for tithes, &c. the defendant may avoid the action, by proving that the plaintiff obtained his presentation by a simoniacal contract; or in an action for treble damages, the defendant may set up the simony of the plaintiff as a defence. (7) But an action cannot be sustained for the tithes and profits which a simoniacal incumbent may have received. (8)

When simony
cannot be set
up in an action
for use and oc-
cupation, or for
compounded
tithes.

In an action for use and occupation by an incumbent against a tenant of the glebe lands, who had paid him rent, the defendant was not permitted to give evidence of a simoniacal presentation of the plaintiff, in order to avoid his title; because, as observed by Lord Kenyon in *Cooke (Clerk) v. Loxley* (9), "in an action for use and occupation it ought not to be permitted to a tenant who occupies land by the licence of another, to call upon that other to show the title under which he let the land."

A parishioner who has compounded with the parson one year for his tithes, and has not determined the composition, cannot set up as a defence to an action for the next year's composition money, that the plaintiff is simoniacus (10), because the defendant has enjoyed the consideration, and had the full benefit on his side of the contract, and the plaintiff is therefore in like manner entitled to claim the benefit of his bargain.

(1) 3 Inst. 154. F. N. B. 176.

(2) *Kitchin v. Culvert*, Lane, 103.

(3) *Gregorie's case*, 6 Co. 20.

(4) *Rex v. Lewis*, 1 Str. 70. *Phillips' case*, Sid. 170.

(5) 5 B. & A. 835.; *ad vide* S. C. 3 Bing. 598. *in error*.

(6) *Baker v. Rogers*, Cro. Eliz. 789. 3 Inst. 154.

(7) *Winchcombe v. Winchester (Bishop of)*, Hob. 168.

(8) 1 Inst. 120. (a). *Winchcombe v. Winchester (Bishop of)*, Hob. 168. *Ricshy v. Westworth*, Cro. Eliz. 642. *Rouse (Sir J.) v. Wright*, March, 84.

(9) 5 T. R. 4.

(10) *Brooksbey (Clerk) v. Watts*, 6 Tuck. 333.

In *Rex v. Oxford (Bishop of)* (1) it appeared that a chapel in the township of P. was endowed in 1428, by a deed executed by the then proprietor of the rectory, the then vicar, and the inhabitants of the township, and confirmed by the diocesan; whereby, in consideration of a yearly payment to the vicar, it was provided that the curate of the chapel should receive all the tithes due to the vicar from the inhabitants, and should be appointed by them; under which deed they continued to exercise the power of appointment and presentation. In 1797, an act passed for inclosing open lands in the township, in which it was recited, as if a matter of doubt, whether the curate was entitled to the small tithes, or to a modus in lieu of tithes, the decision of which was left untouched by the act. In 1801, upon a vacancy, the inhabitants appointed and presented a curate, upon an agreement signed by him and the principal inhabitants, wherein they stated that he was appointed to the curacy, &c. and to the money payment of 40*l.* 8*s.* 2*d.* annually, payable out of the lands and hereditaments in P., in the right of the curacy, together with surplice fees and all other profits, privileges, and appurtenances to the same belonging and of right payable; that the inhabitants, considering that sum not sufficient for the proper support of the curate, had voluntarily agreed with him to pay a further annual sum of 29*l.* 11*s.* 10*d.*, with a proviso that "it shall not in any respect alter the money payment of 40*l.* 8*s.* 2*d.* wherewith the said lands are and have been, time immemorial, charged in right of the said church:"—Upon these facts Lord Ellenborough observed, "In construing this agreement, whether it be simoniacal or not, I shall look only at the agreement itself and the act of parliament, which states the doubt whether the curate be entitled to take the small tithes in kind, or to a modus. This doubt is stated in an act of parliament which passed four years before the election; and yet, when the inhabitants come to elect a curate, they make a stipulation with one of the candidates that he shall sign an agreement, whereby he admits that 40*l.* 8*s.* 2*d.* is the immemorial money payment to the curate out of the lands of the township. He was therefore intended to be estopped by his own agreement from insisting upon the right of the curate to the small tithes, and to furnish evidence against the right, to be preserved, probably in the parish chest. This, I am clearly of opinion, was simoniacal. If a presentee do but bargain with his patron to forbear any suit, for the purpose of trying, by due course of law, whether or not he be entitled to small tithes, that is an agreement for a benefit within the statute 31 Eliz. c. 6., and amounts to simony."

Notwithstanding there is no remedy for the tithes which a simoniacal incumbent has actually received, yet in an action for treble damages the occupiers may plead that the plaintiff was no parson, because of the simony; or the parishioners may deny their tithes, and allege in the Spiritual Court, that he came in by simony. (2)

The king cannot dispense with the disability occasioned by simony by non obstante, for in this law the king's subjects have an interest, and therefore the king cannot dispense therewith no more than with the common law. (3)

SIMONY BY
STATUTE.

If a presentee bargain with his patron to forbear any suit respecting his clerical rights it will be simony.

Judgment of Lord Ellenborough in *Rex v. Oxford (Bishop of)*.

Defence of occupiers or parishioners against simoniac.

Disability from simony cannot be dispensed with.

(1) 7 East, 600. 3 Smith, 570.

(2) 1 Inst. 120. (a). *Stukeley v. Butler*, Hob. 168.

(3) 3 Inst. 153. 1 Ibid. 120. (a). *Wincombe v. Winchester (Bishop of)*, Hob. 165.

SIMONY BY
STATUTE.

So it has been held, that the incumbent who is once presented, admitted, and instituted upon a simoniacal contract, is a person disabled to hold that benefice, although he obtain a presentation de novo from the king, for the statute has disabled him (1): — in fact, neither the pope or the king could pardon simony quoad culpam, but only quoad pœnam. (2)

Where a person is preferred to a benefice by simony, and a general pardon comes afterwards, whilst he holds it, still he will not be able to hold the benefice, for he never was legal incumbent, by reason of the simony; for though the pardon discharges the punishment of simony, the matter is still examinable by the ordinary, who ought to provide that the benefice is not served by corrupt persons. (3)

It was said in one case, that where the right of presentation is in one and of nomination in another, and only one is guilty of simony, his act shall not prejudice the other, or render him liable to any forfeiture. (4)

RESIGNATION
BONDS.

5. RESIGNATION BONDS.

What constitutes an illegal bond.

Sir Simon Degge (5) says, "There is of late time a practice introduced by corrupt patrons, that if not nipt early in the budding will make the law, the statute of Elizabeth, of none effect. I mean the taking bonds for resignation. The practice took its rise from two cases in Sir George Croke's reports." (6)... And "it appears by both these cases that bonds taken upon prudent and just ends to resign are not simoniacal; but where such bonds are taken upon corrupt designs, and it be made appear by any subsequent practice or action, it is clearly simony; as if the bond had been expressly to pay money. For what difference is there between a bond expressly to pay money and a bond to resign, which is to pay money, if the patron say, either pay me so much money or resign; when all the world knows, in such a case the parson must pay the money or resign and be undone. And the world shall never persuade me, that those reverend judges that gave these judgments ever intended further; and I hope that the reverend judges that now supply their places will discountenance and discourage such practices that tend so much to the ruin of the church and religion." (7)

Purchase of next presentation by a father for his son.

If a father purchase the next presentation of a living as a provision for his son, it is not simony, notwithstanding the son was present at the making of the agreement; for a father is bound to provide for his son. (8)

Bond given to a father to secure an annuity to his son until he obtained a living of a certain value.

Where a bond had been given to a father to secure an annuity to his son till he should obtain a living of a certain value, and an agreement was at the same time entered into reciting the bond, and that the son should forthwith enter into orders and accept such living, the lord chancellor considering that this bond was connected with a simoniacal agreement,

(1) *Rex v. Norwich (Bishop of)*, Cro. Jac. 385. *Booth v. Potter*, ibid. 533. 1 Inst. 120. (a).

(2) Godolphin's Repertorium, 543.

(3) *Smith v. Shelbourn*, Cro. Eliz. 685. *Rex v. Norwich (Bishop of)*, Cro. Jac. 385.

(4) *Calvert v. Kitchin*, Lane, 71.

(5) P. C. by Ellis, 53—55.

(6) *Barker v. Bacon* (Sir N. V. Cro. Jac. 48. *Balington v. Ward*, Cro. Car. 180

(7) Vide Godolphin's Repertorium, 540

(8) *Smith v. Shelbourn*, Cro. Eliz. 685.

doubted as to its validity, it being the policy of the church that orders should not be taken upon pecuniary considerations. (1)

A bond given by an incumbent to the patron, on presentation, to reside on the living, or to resign if he did not return to it after notice, and also not to commit waste, &c., on the parsonage house, is good, because it only requires him to do what the law would have compelled him to do without it. In such case a licence to the incumbent to absent himself from the living may be revoked at any time, at the pleasure of the party who granted it. (2)

In an action of debt upon an obligation to perform covenants, it appeared that T. B., son of W. B., promised to marry A., the defendant's daughter; in consideration of which marriage it was covenanted, amongst other things, that the defendant would procure T. B. to be presented, &c. to a certain benefice upon the next avoidance; and the breach assigned, was the non-performance of such covenant. It was demurred to by the defendant as a simoniacal covenant; and resolved thereon that if it had appeared to have been, that in consideration of the marriage of his son he would procure him to be instituted into the benefice, it would have been a simoniacal contract; but the covenant not being in consideration of the former covenant, nor depending thereon, but a distinct covenant of itself, could not, without a special averring or showing that it was a simoniacal contract, be so intended. (3)

Though the condition of a bond may be ill as to one part, it may be well as to others, for at common law the bad part may be separated from the good. Thus, where it was conditioned to pay money to the obligee upon the conveyance of an estate to the obligor, and to present the obligee's son to the next avoidance of a church, the advowson of which belonged to the estate, if he were then of age to take it, or if not, to procure the person who should be presented to resign, upon notice of the son's being qualified to take it, and to present him:—It was held, that admitting that part of the condition for the presentation of the obligee's son to be simoniacal, yet the bond was good for the payment of the money. (4)

A bond given to an incumbent, securing him an annuity of equal value with the profits of the benefice upon his resignation, in order that another may be presented, who might give a general bond of resignation, so that the patron's son, when of proper age, might be presented, has been held to be a bond within stat. 31 Eliz. c. 6. s. 8. and void. (5) For all such contracts for money are void and against law, *contractus ex turpi causa, et contra bonos mores*. (6)

Hence, if a resignation be made for the use of another person, that is, with a condition, that if one of two persons named be not admitted to the benefice resigned within six months, the resignation will be void. All

RESIGNATION BONDS.

Bond from incumbent to reside and not to commit waste.

Marriage contracts.

Condition of a bond may be bad as to one part, but good as to another.

BONDS WITHIN STAT. 31 ELIZ. c. 6. s. 8.

(1) *Kircudbright (Lord), v. Kircudbright (Lady)*, 8 Ves. 53.

(2) Vide etiam *Peele v. Capel*, 1 Str. 534. *Bagshaw v. Rossley (Clerk)*, 4 T. R. 359. *Quare*, Whether a bond of resignation, with condition to reside, to resign for the patron's son to be presented, and to keep the premises on the living in repair, be not good in law? *Partridge v. Whiston (Clerk)*, *ibid.* 359.

(3) *Byrte v. Manning*, Cro. Car. 425. *Godolphin's Repertorium*, 554.

(4) *Newman v. Newman*, 4 M. & S. 66.; vide etiam *Greenwood v. London (Bishop of)*, 5 Taunt. 727.

(5) *Young v. Jones*, 3 Doug. 97.

(6) *Winchcombe v. Winchester (Bishop of)*, Hob. 167. *Bartlett v. Vinor*, Carth. 252.

resignations must be purè, spontè et simpliciter, and made to the proper person, that is, to the next immediate superior, and not to the mediate, as of a church presentative to the bishop, and not to the metropolitan. (1)

In *Peele v. Capel* (2) it appeared, that the patron on presenting a person to a living took a bond for resigning, when the patron's nephew, for whom the living was intended, should be of age. At his coming of age, it was agreed that the presentee should continue to hold the living on paying the nephew thirty pounds a year. After having paid this seven years, the presentee refused to pay it any longer. An action being brought on the bond, the presentee filed a bill in equity, and prayed an injunction to have all the money repaid. An injunction was granted, not on account of the validity of the bond, but because an ill use had been made thereof. As to the money which had been paid, it being paid on a simoniacal contract, the presentee was left to his remedy at law.

So on a bill to be relieved against a judgment obtained on a general bond for resigning a benefice, it appeared that the obligee had made an offer to the incumbent, that if he would give him 700*l.* he should not be sued upon the bond. Satisfaction was ordered to be entered on the judgment, and a perpetual injunction was granted, a new bond of resignation on the penalty of 200*l.* was decreed, but it was ordered that no action should be brought thereupon without leave of the Court: the lord keeper observing, "The proof in this case lies on the defendant's part, and unless they make out some good reason for removing him, I shall certainly decree against the bond. Bonds for resignation have been held good in law; the statute of 31 Eliz., against simony, made the penalty upon the lay patron; and I do not remember any case of resignation bonds before that statute; and they have been allowed since, only to preserve the living for the patron himself, or for a child, or to restrain the incumbent from non-residence, or a vicious course of life; and if any other advantage be made thereof, it will avoid the bond; and where it is general, for resignation, yet some special reason must be shown, to require a resignation, or I will not suffer it to be put in suit; if it should not be so, simony will be committed without proof or punishment; a particular agreement must be proved, to resign for the benefit of the friend that would be presented; and without such agreement the bond ought not to be sued, but for misbehaviour of the parson; and here are proofs in this case of endeavours to get money out of the plaintiff." (3)

STAT. 12 ANNE,
R. II. C. 12. S. 2.
Penalty of
taking for any
sum of money,
&c. the next
avoidance.

Stat. 12 Anne, st. ii. c. 12. s. 2. (4), after reciting that some of the clergy had procured preferments for themselves by buying ecclesiastical livings, and others had been thereby discharged, enacts, "that if any person shall or do, for any sum of money, reward, gift, profit, or advantage, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, in his own name, or in the name of any other person or persons, take, procure, or accept the next avoidance of, or presentation to, any benefice with cure of souls, dignity, prebend, or living ecclesiastical, and shall be presented or collated

(1) *Gayton's case*, Owen, 12. 2 Rol. Abr. Presentment (F.), 358. pl. 2.

(2) 1 Str. 534.

(3) *Hilhard v. Stapleton*, Eq. Ca. Abr. 59.

(4) Stephens' Ecclesiastical Statutes, 709.

thereupon, that then every such presentation or collation, and every admission, institution, investiture, and induction upon the same shall be utterly void, frustrate, and of no effect in law, and such agreement shall be deemed and taken to be a simoniacal contract; and that the queen and her successors may present or collate unto, or give or bestow every such benefice, dignity, prebend, and living ecclesiastical for that one time or turn only; and the person so corruptly taking, procuring, or accepting any such benefice, dignity, prebend, or living shall thereupon, and from thenceforth, be adjudged a disabled person in law, to have and enjoy the same benefice, dignity, prebend, or living ecclesiastical, and shall also be subject to any punishment, pain, or penalty, limited, prescribed, or inflicted by the laws ecclesiastical, in like manner as if such corrupt agreement had been made after such benefice, dignity, prebend, or living ecclesiastical had become vacant."

RESIGNATION
BONDS.

By stat. 7 & 8 Geo. 4. c. 25. s. 1. no presentation, collation, gift, or bestowing of any such spiritual office to or upon any spiritual person, before April 9. 1827, nor any admission, institution, investiture, or induction thereupon, shall be void, frustrate, or of no effect in law, for or by reason of any such engagement made, given, or entered into by such spiritual person, or any other person or persons, to or with the patron or patrons of such spiritual office, or to or with any other person or persons, for the resignation of the same, to the intent or purpose manifested by the terms of such engagement, that some person specially named or described therein, or one of two persons so specially named or described, should be presented, collated, or nominated to such spiritual office, or that the same should be given or bestowed to or upon him, or for the resignation thereof upon notice or request, or otherwise, when a person, or one of two persons, so specially named or described, should become qualified, by age or otherwise, to accept and take the same; and that it shall not be lawful for the king or his successors, for or by reason of such engagement as aforesaid, to present or collate unto, or give or bestow such spiritual office; and that such spiritual person, and patron or patrons, or other person or persons respectively, shall not be liable to any pains, penalty, forfeiture, loss, or disability, nor to any prosecution or other proceeding, civil, criminal, or penal, in any court ecclesiastical or temporal, for or by reason of his, her, or their having made, given, or entered into, or accepted or taken, such engagement as aforesaid; and that every such presentation or collation, or gift, or bestowing, before April 9. 1827, and every admission, institution, investiture, and induction thereupon shall be as valid and effectual in the law, to all intents and purposes whatsoever, as if such engagement had not been made, given, or entered into, or accepted or taken.

STAT. 7 & 8
Geo. 4. c. 25.
ss. 1 & 2.
No presentation to any spiritual office, made before 9th April, 1827, shall be void on account of any agreement to resign, when another person, specially named, shall become qualified to take the same.

Persons making any such agreement, not subject to any penalty on account thereof.

By sect. 2., every such engagement which has been made, given, or entered into, at any time before April 9. 1827, for the resignation of any benefice with cure of souls, dignity, prebend, or living ecclesiastical, to the intent or purpose manifested by the terms of such engagement, that some person specially named or described therein, or one or two persons so specially named or described, should be presented, collated, or nominated to such spiritual office, or that the same should be given or bestowed to or upon him, or for the resignation thereof upon notice or request, or otherwise, when a person, or one of two persons, so specially named or

Sect. 2.
All such engagements entered into before 9th April, 1827, to be valid and effectual in law.

RESIGNATION BONDS.

Stat. 7 & 8
Geo. 4. c. 25.
ss. 3 & 4.

Sect. 3.
Engagements
not *bonâ fide*
made with such
intent.

Sect. 4.
If the person
so specially
named be not
presented to
such spiritual
office within six
months, the re-
signation shall
be void.

Stat. 9 Geo. 4.
c. 94. ss. 1—3.
Engagements
between cer-
tain parties en-
tered into for
the resignation
of any benefice,
upon notice or
request, to be
valid.

Sect. 2.
Relationship of
such persons.

Sect. 3.
Non

described, should become qualified, by age or otherwise, to accept and take the same, shall be valid.

By sect. 3., nothing in the act is to extend to the case of any engagement which shall not have been made, given, or entered into, really and *bonâ fide*, to the intent or purpose aforesaid, and no other; but nothing therein contained is to be deemed compulsory upon the ordinary to accept the resignation.

By sect. 4., in every case where any such spiritual office shall, after the passing of the act, be resigned, pursuant to any such engagement, and the person, or one of the two persons, so specially named or described therein, shall not be presented, collated, nominated, or appointed by donation to such spiritual office within six calendar months next after such resignation, the resignation which shall so have been made pursuant to such engagement shall be void; and the spiritual person who shall so have resigned shall, without any act or form, and as if such resignation had not been made, be deemed and taken to be and to have continued the incumbent actually in possession of such spiritual office, notwithstanding such resignation, and although within the said six months any other person may have been presented, collated, nominated, instituted, or inducted thereto, or received investiture thereof, provided such person so resigning shall not, by reason of any other act or thing, have become disqualified to hold the same.

Stat. 9 Geo. 4. c. 94. s. 1., after reciting it was expedient, that certain bonds, covenants, and other assurances for the resignation of ecclesiastical preferments should be rendered valid, enacts, that every engagement by promise, grant, agreement, or covenant which shall be really and *bonâ fide* made, after July 28. 1828, for the resignation of any spiritual office, being a benefice with cure of souls, dignity, prebend, or living ecclesiastical, to the intent or purpose to be manifested by the terms of such engagement, that any one person whosoever, to be specially named and described therein, or one of two persons to be specially named and described therein, being such persons as are thereafter mentioned, shall be presented, collated, nominated, or appointed to such spiritual office, or that the same shall be given or bestowed to or upon him, shall be valid in law, and that the performance of the same may also be enforced in equity; provided that such engagement be so entered into before the presentation, nomination, collation, or appointment of the party so entering into the same.

By sect. 2., where two persons shall be so specially named and described in such engagement, each of them shall be, either by blood or marriage, an uncle, son, grandson, brother, nephew, or grand nephew of the patron or of one of the patrons of such spiritual office, not being merely a trustee of the patronage of the same, or of the person for whom the patron shall be a trustee, or of the person by whose direction such presentation, collation, gift, or bestowing shall be intended to be made, or of any married woman whose husband in her right shall be the patron of such spiritual office, or of any other person in whose right such presentation, collation, gift, or bestowing shall be intended to be made.

By sect. 3., no presentation, collation, gift, or bestowing to or of any such spiritual office of or upon any spiritual person, to be made after the passing of the act, nor any admission, institution, investiture, or induction

thereupon shall be void, for or by reason of any such engagement so to be made, given, or entered into by such spiritual person, or any other person, to or with the patron of such spiritual office, or to or with any other person, for the resignation of the same; and it shall not be lawful for the king, for or by reason of any such engagements, to present or collate unto, or give or bestow such spiritual office; and such spiritual person and patron, or other person respectively shall not be liable to any pains, penalty, forfeitures, loss, or disability, nor to any prosecution or other proceeding, civil, criminal, or penal, in any court, ecclesiastical or temporal, for having made such engagement; and every such presentation or collation, or gift, or bestowing, to be made after the passing of the act, and every admission, institution, investiture, and induction thereupon, will be valid.

RESIGNATION BONDS.

void by reason of such agreement to resign. Persons making such agreement not to be liable to penalty.

Such presentations to be valid.

By sect. 4. some one part of the deed, instrument, or writing, by which such engagement shall be made, must, within the space of two calendar months next after the date thereof, be deposited in the office of the registrar of the diocese wherein the benefice with cure of souls, dignity, prebend, or living ecclesiastical, for the resignation whereof such engagement shall be made, shall be locally situate, except as to such benefices with cure of souls, dignities, prebends, or livings ecclesiastical as are under the peculiar jurisdiction of any archbishop or bishop, in which case such document must be deposited in the office of the registrar of that peculiar jurisdiction to which they are subject; and such registrars are respectively to deposit and preserve the same, and give and sign a certificate of such deposit; and every such deed, instrument, or writing is to be produced at all proper and usual hours, at such registry, to every person applying to inspect the same; and an office copy of each such deed, instrument, or writing, certified under the hand of the registrar (and which office copy, so certified, the registrar is in all cases to grant to every person who shall apply for the same), is in all cases to be admitted and allowed as legal evidence thereof; and every such registrar will be entitled to the sum of two shillings and no more, for so depositing such deed, instrument, or writing, and so certifying such deposit thereof; and the sum of one shilling and no more for each search to be made for the same; and the sum of sixpence and no more, over and besides the stamp duty, if any, for each folio of seventy-two words of each such office copy so certified.

Stat. 9 Geo. 4. c. 94. ss. 4—6. not to extend to any engagements, unless the deed be deposited within two months with the registrar of the diocese or peculiar jurisdiction wherein the benefice is situated.

Deed to be open to inspection, and a certified copy to be admitted as evidence.

Fees to registrar.

By sect. 5. every resignation to be made in pursuance of any such engagement must refer to the engagement in pursuance of which it is made, and state the name of the person for whose benefit it is made; and the ordinary cannot refuse such resignation, unless upon good and sufficient cause to be shown for that purpose; and such resignation will not be valid except for allowing the person for whose benefit it shall be so made, to be presented, collated, nominated, or appointed to the spiritual office thereby resigned, and will be absolutely void unless such person be presented, collated, nominated, or appointed within six calendar months next after notice of such resignation shall have been given to the patron of such spiritual office.

Sect. 5. Resignation to state the engagement, and name of person for whom made.

Resignation to be void, unless the person be presented within six months.

By sect. 6. nothing in the act extends to any case where the presentation, collation, gift, or bestowing to or of any such spiritual office is made by the king, in right of his crown or his duchy of Lancaster; or

Sect. 6. Presentations made by the Crown excepted.

**RESIGNATION
BONDS.**

by any archbishop, bishop, or other ecclesiastical person, in right of his archbishopric, bishopric, or other living, office, or dignity; or by any other body politic or corporate, whether aggregate or sole, or by any other person in right of any office or dignity; or by any company, or any feoffees or trustees for charitable or other public purposes; or by any other person not entitled to the patronage of such spiritual office as private property.

Before the statute, a general bond of resignation upon request, and given previous to presentation, was good, and was not sufficient ground for the ordinary to refuse admission. (1)

Stat. 3 & 4 Vict.
c. 113. s. 42.
Spiritual per-
son not to sell,
or assign, any
right of patron-
age.

By stat. 3 & 4 Vict. c. 113. s. 42. no spiritual person can lawfully sell or assign any patronage or presentation belonging to him by virtue of any dignity or spiritual office held by him, and if he do, such sale or assignment will be null and void.

SUNDAY.

Canon 13. — Due celebration of Sundays and holydays — Stat. 27 Hen. 6. c. 5. s. 1. — Fairs and markets — Stat. 29 Car. 2. c. 7. s. 2. — Publicly crying or exposing to sale any merchandise, &c. — Sale of goods made on a Sunday, which is not made in the exercise of the ordinary calling of the vendor or his agent, is not void at common law, or by stat. 29 Car. 2. c. 7. — Judgment of Chief Justice Mansfield in DUBRY v. DEROX. TAINE — Stat. 1 Car. 1. c. 2. s. 1. — Sunday meetings or assemblies for unlawful pastimes — Stat. 21 Geo. 3. c. 49. — House opened on a Sunday to which persons shall be admitted by payment, &c. to be deemed a disorderly house — Stat. 1 & 2 Gul. 4. c. 22. s. 3. — Killing game — Stat. 3 Car. 1. c. 2. — Carriers — Butchers — Stat. 29 Car. 2. c. 7. s. 1. — No person to exercise their ordinary callings on the Lord's day — One offence can only be committed on the same day, by exercising "ordinary callings" — At common law the observance of the Sabbath was a duty of imperfect obligation, to rectify which stat. 29 Car. 2. c. 7. was passed — Judgment of Mr. Justice Bayley in FENNEL v. RIDLER — Bill of exchange, drawn on a Sunday, but not accepted on that day — Stat. 29 Car. 2. c. 7. s. 5. only prohibits a man's ordinary calling — Attorneys — Owners of stage coaches — Contract for the sale of goods — Drivers, waggons, &c. not to come into inns, &c. on Sundays — Stat. 3 & 4 Gul. 4. c. 19. s. 26. — 2 & 3 Vict. c. 47. s. 51. — Route of stage coaches, cattle, &c. — Stat. 9 Anne, c. 23. s. 20. & 1 & 2 Gul. 4. c. 22. s. 37. — Hackney coachmen — Dressing or selling meat — Victualling houses, &c. — Crying milk — Stat. 2 & 3 Vict. c. 47. s. 42. — Public houses to be shut on the mornings of Sundays — Stat. 7 & 8 Geo. 4. c. lxxv. — Watermen — Stat. 29 Car. 2. c. 7. s. 5. — The hundred not responsible to persons travelling on the Lord's day — Recovery of penalties under stat. 29 Car. 2. c. 7. — Service of temporal process — Service of ecclesiastical process — Arrest upon a warrant for good behaviour — An arrest on criminal process, will not be allowed to facilitate the execution of civil process — Stat. 5 Anne, c. 9. — When an arrest may be made — Fish carriages — Stat. 6 & 7 Gul. 4. c. 37. s. 14. & 5 Geo. 4. c. cvi. — Bakers — Stat. 3 & 4 Gul. 4. c. 31. — Election of public officers — Stat. 6 & 7 Gul. 4. c. 58. — Bills of exchange and promissory notes.

Canon 13.
Due celebra-
tion of Sundays
and holydays.

By canon 13. "all manner of persons within the Church of England shall from henceforth celebrate and keep the Lord's day (2), commonly called Sunday, according to God's holy will and pleasure, and the orders of the

(1) *London (Bishop of) v. Ffytche*, in error, 2 Bro. P. C. 211. 1 East, 487. n. 3 Dougl. 142.; et vide *Rowlatt v. Rowlatt*, 1 J. & W. 260.

(2) The duty of the holy keeping the Lord's day is thus described by Lyndwood (Prov. Const. Ang. 56.), under the word "Sanctifices, i. e. sanctum et mundum venerando

Church of England prescribed in that behalf; that is, in hearing the word of God read and taught, in private and public prayers, in acknowledging their offences to God, and amendment of the same; in reconciling themselves charitably to their neighbours where displeasure hath been, in oftentimes receiving the communion of the body and blood of Christ, in visiting the poor and sick, using all godly and sober conversation."

By stat. 27 Hen. 6. c. 5. s. 1. (1) all fairs and markets on the principal feasts of the church on Sundays, the four Sundays in harvest excepted, and on Good Friday, are ordered to cease from showing any goods or merchandises, necessary victuals only excepted, on pain of forfeiting the goods exposed to sale.

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Stat. 27 Hen. 6.
c. 5. s. 1.
Fairs and markets.

And by stat. 29 Car. 2. c. 7. s. 2. (2), if any person publicly cry, show forth, or expose to sale any wares, merchandises, fruit, herbs, goods, or chattels whatsoever upon the Lord's day, the person so offending will be liable to forfeit the same.

Stat. 29 Car. 2.
c. 7. s. 2.
Publicly crying or exposing to sale any merchandise. &c.

Respecting the words "expose to sale," "*Negotiatio die Diminicâ*" was strictly forbidden by the laws of Alfred, Athelstan, and Edgar (3); which is agreeable to the rule of the canon law: "*Omnes dies Dominicos à vesperâ, in vesperam cum omni yeneratione decernimus observari, et ab omni illicito opere abstinere; ut in eis mercatum minime fiat, neque placitum, neque aliquis ad mortem vel ad pœnam judicetur; nec sacramenta (nisi pro pace vel alia necessitate) præstentur.*" (4) In the canons of 1571 (5), where fairs and markets are forbidden, an allowance is implied, for the selling of some small matters after divine service; but here nothing is to be exposed to sale upon the Lord's day, or any part thereof.

In *Drury v. Defontaine* (6) it was decided, that a sale of goods made on a Sunday, which is not made in the exercise of the ordinary calling of the vendor, or his agent, is not void at common law, or by stat. 29 Car. 2. c. 7.; Chief Justice Mansfield observing, "The bargaining for and selling horses on a Sunday is certainly a very indecent thing, and what no religious person would do. But we cannot discover that the law has gone so far as to say that every contract made on a Sunday shall be void, although, under these penal statutes, if any man, in the exercise of his ordinary calling, should make a contract on the Sunday, that contract would be void. It appears that the horse was not sent to Hull for the purpose of private sale, but for the purpose of being sold by auction; for it may be gathered from the evidence, that Hull keeps a repository for sale by auction. Therefore Hull did not sell this horse, properly speaking, as a horsedealer. It is said by Lord Coke, that the Christian religion is part of the common law, and such a sale certainly is directly contrary to the practice of those religious duties which it was the purpose of the legislature to enforce, as expressed in the

Sale of goods made on a Sunday, which is not made in the exercise of the ordinary calling of the vendor, or his agent, is not void at common law, or by stat. 29 Car. 2. c. 7.

Judgment of Chief Justice Mansfield in *Drury v. Defontaine*.

servat; generaliter, scilicet, illo die à vitiis cessando; specialiter, ab operibus corporalibus, quæ impediunt vacationem ad Deum, abstinendo: specialissimè, contemplationi divinorum totaliter inharendo." Bishop Stillingfleet (1 Eccles. Ca. 38.) is also of opinion, "that the religious observation of the Lord's day is no novelty started by some late sects and parties among us, but that it hath been the general sense of the best part of the Christian world, and is

particularly enforced upon us of the Church of England, not only by the homilies, but by the most ancient ecclesiastical laws among us."

(1) *Ibid* Stephens' Ecclesiastical Statutes, 110. *in not*.

(2) *Ibid*. 614. *in not*.

(3) Spel. 377. 404. 450.

(4) Extra. l. 2. 9. c. 1.

(5) Coll. Can. 236.

(6) 1 Taunt. 131.

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preamble of stat. 29 Car. 2., namely, 'that every person whatsoever shall on the Lord's day apply themselves to the observation of the same, by exercising themselves thereon in the duties of piety and true religion publicly and privately;' which certainly is not likely to be done by those whose minds are engaged in making bargains and selling horses. Lord Coke (1) cites a Saxon law of King Athelstan, the latter part of which is, 'Die autem dominico nemo mercaturam facito; id quod si quis egerit, et ipsâ merce, et triginta præterea solidis mulctator;' upon which Lord Coke observes, 'Here note, by the way, that no merchandising should be on the Lord's day.' But it does not appear, that the common law ever considered those contracts as void which were made on a Sunday. In *Comyns v. Boyer* (2) the defendant pleaded a sale in open fair; but in stating a right to hold the fair, he did not except the case of the fair day falling on a Sunday; and it was urged, that the plea was bad, because a fair held on that day would be illegal, as coming within stat. 27 Hen. 6. c. 5. of fairs and markets. The Court determined, that the holding a fair on that day would be illegal, but that the contract would not be void. The law is since changed, and if any act is forbidden under a penalty, a contract to do it is now held void. But though that case is not now law, it shows that there was nothing in the common law which would avoid a sale made on the Sunday, otherwise this mention of the statute would not have been introduced. Stat. 29 Car. 2. is the only statute that can possibly apply here. It enacts that 'No person whatsoever shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day.' To bring this case within the act, we must pronounce, that either Drury or Hull worked within their ordinary callings on the Sunday. But the sale of horses by private contract was not Drury's ordinary calling, nor was it Hull's; his calling was that of a horse auctioneer, and he was not within his ordinary calling in selling this horse by private contract; and therefore, although it is to be lamented, the sale must be held good, and the rule discharged."

Stat. 1 Car. 1.
c. 2. s. 1.
Sunday meet-
ings or assem-
blies for unlaw-
ful pastimes.

By stat. 1 Car. 1. c. 2. s. 1. (3) there are to be no meetings, assemblies, or concourse of people out of their own parishes on the Lord's day, or any sports and pastimes whatsoever, nor any bear baiting, bull baiting, interludes, common plays, or other unlawful exercises and pastimes, used by any person within their own parishes, and persons so offending are liable to forfeit for every offence 3s. 4d. to the use of the poor. But no person is to be impeached, except his conduct be called in question within one month next after the offence committed.

A provision then occurs that the ecclesiastical jurisdiction shall remain unimpaired, notwithstanding the provisions of the statute.

Stat. 21 Geo. 3.
c. 49.
House opened
on a Sunday, to
which persons
shall be ad-
mitted by pay-
ment, &c. to
be deemed a
disorderly
house, &c.

By stat. 21 Geo. 3. c. 49. any house, room, or other place opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever, upon any part of the Lord's day, and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house or place; and the keeper of such house, room or place, shall forfeit the sum of 200*l.* for every day that such house, &c. shall be so opened or used, to such person as will sue for the same.

(1) 2 Inst. 220.

(2) Cro. Eliz. 485.

(3) Vide Stephens' Ecclesiastical Statutes, 537. *in not.*

and be otherwise punishable as the law directs in cases of disorderly houses; and the person managing or conducting such entertainment or amusement, or acting as master of the ceremonies there, or as a moderator, president, or chairman of any such meeting for public debate, shall likewise, for every such offence, forfeit the sum of 100*l.* to such person as will sue for the same; and every door keeper, servant, or other person who shall collect or receive money or tickets from persons assembling at such house, shall also forfeit the sum of 50*l.* to such person as will sue for the same.

The foregoing penalties are recoverable in any of the courts at Westminster with full costs, within six months after the offence committed.

By stat. 1 & 2 Gul. 4. c. 32. s. 3., if any person kill or take any game, or use any dog, gun, net, or other engine or instrument for the purpose of killing or taking any game on a Sunday or Christmas-day, such person, on conviction thereof before two justices of the peace, will be liable to forfeit and pay for every such offence such sum of money not exceeding 5*l.*, as to the justices shall seem meet, together with the costs of the conviction.

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Stat. 1 & 2 Gul.
4. c. 32 s. 3.
Killing game.

By stat. 3 Car. 1. c. 2., if any carrier with any horse, or waggon-man with any waggon, or carman with any cart, or wainman with any wain, or drover with any cattle, by himself or any other, travel upon Sunday, he will be liable to forfeit 20*s.* for every such offence.

Stat. 3 Car. 1.
c. 2.
Carriers.

In *Ex parte Middleton* (1) it was held, that a person who is the driver of, or has the care of, a van as a carrier, is within the meaning of stat. 3 Car. 1. c. 2., and liable to be convicted in the penalty of 20*s.* for travelling on the Lord's day.

By stat. 3 Car. 1. c. 2., if any butcher by himself, or any other for him, by his privity or consent, kill or sell any victuals upon the Lord's day, he will be liable, for every offence, to forfeit the sum of 6*s.* 8*d.*, if the prosecution be commenced within six months after the commission of the offence.

Butchers.

To an indictment for exercising the trade of a butcher on a Sunday, an exception was taken, that it was not laid to be against the form of the statute, and that it was no offence at common law: upon demurrer, judgment was given for the defendant. (2)

By stat. 29 Car. 2. c. 7. s. 1. (3) no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings (4) upon the Lord's day, or any part thereof, works of necessity and charity only excepted.

Stat. 29 Car. 2.
c. 7. s. 1.
No person to
exercise their
ordinary call-
ings on the
Lord's day.

This enactment as to worldly labour is analogous to the laws of Ina (5): "Servus, si quid operis patratet die Dominico ex præcepto Domini sui, liber esto; Dominus 30 solidos dependito. Verùm si id operis, injussu Domini sui, aggressus fuerit, verberibus cæditor, aut saltem virgarum metum pretio redimito. Liber, si die hoc operetur injussu Domini sui, aut servituti addictor, aut 60 solidos dependito. Sacerdos si in hanc partem deli-

(1) 3 B. & C. 161.

(2) *Rex v. Brotherton*, 1 Str. 702; *Maria v. Hill*, 1 Fawc. 35.(3) *Five Stephens' Ecclesiastical Statutes*, 111. 16 and

(4) As to ordinary callings, in the register of Archbishop Cuthley (2 Cuth. 205, (b)) there is a special declaration, forbidding the barbers of London to exercise

their callings on the Lord's day; and in a visitation of Archbishop Warham, 69. (a), 51. (v), 54. (a), barbers and butchers were presented to the Spiritual Court for exercising their several trades on that day, and admonished to forbear to do it, upon pain of ecclesiastical censures.

(5) Cap. 3.

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One offence can only be committed on the same day, by exercising "ordinary callings."

At common law, the observance of the Sabbath was a duty of imperfect obligation, to rectify which, stat. 29 Car. 2. c. 7. was passed.

Judgment of Mr. Justice Bayley in *Fennell v. Ridler*.

querit, pœna in duplum augetur." So likewise it is stated in the laws of Ethelred (1): "Dominicæ solennia diei cum summo honore magnopere celebranda sunt, nec quicquam in eadem operis agatur servilis." In which case there was one exception in the injunctions of Queen Elizabeth, viz. for labour in time of harvest, after divine service was over; but this (as well as other abuses of the Lord's day) stands prohibited, and is made punishable by stat. 29 Car. 2. c. 7.

The words "worldly labour" are not confined to a man's ordinary calling, but apply to any business he may carry on. (2)

It may be here observed, that a person can commit but one offence on the same day, by exercising his ordinary calling on a Sunday. (3)

Although the religious tenets professed by the Anglican Church are part of the common law, yet, under that law, the observance of the Sabbath was but a duty of imperfect obligation. (4) To remedy this, stat. 29 Car. 2. c. 7. was passed; and that statute being designed for the support of the religion of the country, has received an extended construction.

The best illustration of the provisions of stat. 29 Car. 2. c. 7. and its principles is the judgment of Mr. Justice Bayley in *Fennell v. Ridler* (5), in which case, the learned judge observed, "This case came before the Court upon a motion for a new trial. It was an action upon the warranty of a horse. The plaintiffs were horse-dealers, and the horse was bought and the warranty given on a Sunday; and the only question was, whether, under stat. 29 Car. 2. c. 7., the purchase was illegal, and the plaintiffs precluded from maintaining the action. That is an act for the better observation of Sunday, and after directing, that every person shall on every Lord's day apply himself to the observation of the same by exercising himself in the duties of piety and true religion, publicly and privately, one of its provisions is, that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day, or any part thereof, works of necessity and charity only excepted. That the purchase of a horse by a horse-dealer is an exercise of the business of his ordinary calling, no one can doubt. And is there anything in the spirit or frame of this act which will take such a purchase out of its operation? The spirit of the act is to advance the interests of religion, to turn a man's thoughts from his worldly concerns, and to direct them to the duties of piety and religion; and the act cannot be construed according to its spirit, unless it is so construed as to check the career of worldly traffic. And is there anything in the frame of it to prevent its applying to the case in question? It does not indeed apply to all persons, but to such only as have some ordinary calling; and the interposition of the word 'business' between the words 'labour and work' might justify a question, whether it included every description of the business of a man's ordinary calling, or whether it was not confined to such as was manual and calculated to meet the public eye. There is nothing, however, in the act to show that it was passed exclusively for promoting public decency, and not for regulating private conduct; and though I expressed a doubt upon

(1) Cap. 15.

(2) *Smith v. Sparrow*, 4 Bing. 84.

(3) *Croft v. Durdan*, 2 Cowp. 641.

(4) *Rex v. Bratherton*, 1 Str. 702.

(5) 5 B. & C. 406. This judgment was characterised by Chief Justice Best in *Smith v. Sparrow* (4 Bing. 85.) as "one of the most able judgments ever delivered."

this point in *Bloxsome v. Williams* (1), I am satisfied, upon further consideration, that it would be a narrow construction of the act, and a construction contrary to its spirit, to give it such a restriction. Labour may be private, and not meet the public eye, and so not offend against public decency; but it is equally labour, and equally interferes with a man's religious duties. The same may be said of business, or of work. Each may be public, and meet the public eye; each may be private, and concealed. There is nothing, therefore, in the position of the word 'business' between those of 'labour and work,' which in our judgment can justify us in giving to it anything but its ordinary meaning; and it seems to us, that every species of labour, business, or work, whether public or private, in the ordinary calling of a tradesman, artificer, workman, labourer, or other person, is within the prohibition of this statute.

"The statute, in direct terms, provides that every person shall apply himself to the observation of the Lord's day, publicly and privately; so that private as well as public conduct was expressly within its contemplation. In *Drury v. Defontaine* (2) Lord Chief Justice Mansfield (after the Court had taken time to consider) lays it down, that if any man in the exercise of his ordinary calling make a contract on a Sunday, that contract would be void (and the case before him was a private contract for the purchase of a horse); but he showed, that that case was not within the statute, because no one of the parties was in the exercise of the business of his ordinary calling. His expression, that the contract would be void, probably meant only that it would be void so as to prevent a party, who was privy to what made it illegal, from suing upon it in a court of law, but not so as to defeat a claim upon it by an innocent party; and so it was considered by this Court in *Bloxsome v. Williams*. (3) That was also the case of a private sale of a horse, and an action brought upon a warranty, and to recover back the price. The objection was made, that the purchase was on a Sunday.

"Though I expressed the doubt I have mentioned, whether the statute applied to private sales, such as were not open breaches of the Sunday, that was not the ground of the decision; but very distinct grounds were stated to show that the statute did not apply, for the sale was substantially not on the Sunday, but on a Tuesday. The defendant was the only person who was in the exercise of his ordinary calling, and the plaintiff did not know what his calling was; so that the defendant was the only person who had violated the statute, and it would have been against justice to have allowed him to take advantage of his own wrong to defeat the rights of the plaintiff, who was innocent. These cases, therefore, tend to support the present objection; and upon the principle, that this statute is entitled to such a construction as will promote the ends for which it was passed, that it applies to private as well as public conduct, and that the purchase by the plaintiff was within the mischief intended to be suppressed, and within the words made use of to suppress it, we are of opinion that the plaintiff cannot maintain the present action, and that the rule for a new trial must be made absolute." (4)

SUNDAY.

Judgment of
Mr. Justice
Bayley in
Fennell v.
Ridler.

(1) 3 B. & C. 232.

(2) 1 Taunt. 135.

(3) 3 B. & C. 252.

(4) *Vide etiam* Stephens on Nisi Prius, tit. ASSUMPSIT, 265.

SUNDAY.

Bill of exchange drawn on a Sunday, but not accepted on that day.

an Begbie v. Levi (1), which was an action by an indorsee against the acceptor of a bill of exchange, it appeared, that the bill was drawn on a Sunday, but there was no evidence that it was accepted on that day:—It was held that the plaintiff might recover; but the Court said, that if it had been accepted on a Sunday, and done in the ordinary calling of the defendant, and the plaintiff was acquainted with that circumstance when he took the bill, he would be precluded from recovering on it, but the defendant would not be permitted to set up his own illegal act as a defence, at the suit of an innocent holder of the bill.

Stat. 29 Car. 2. c. 7. s. 5. only prohibits a man's ordinary calling.

Stat. 29 Car. 2. c. 7. s. 5. prohibits only the labour, business, or work done in the course of a man's ordinary calling, but it does not apply to a contract of hiring; and therefore such a contract for a year, made on a Sunday between a farmer and a labourer, has been held to be valid, and that a service under it conferred a settlement. (2)

Attorneys.

An attorney is not within stat. 29 Car. 2. c. 7. s. 1., which prohibits certain persons from doing any work of their ordinary calling on the Lord's day. (3)

And if an attorney, acting on behalf of his client, agree on a Sunday to become personally responsible for part of the debt owing by him, he does not thereby do any work of his ordinary calling within the meaning of stat. 22 Car. 2. c. 7. (4)

Owners of stage coaches.

The owner of a stage-coach is not within stat. 3 Car. 1. c. 2. or stat. 29 Car. 2. c. 7., and therefore an action may be maintained against him for neglecting to take a passenger on a Sunday. (5) Where a coach proprietor refused to carry the plaintiff because there were no other passengers, and who, in consequence, hired a post-chaise to go to his destination, it was held, that the proprietor was liable for the chaise hire, notwithstanding the contract was made on a Sunday. (6)

Contract for the sale of goods.

An action will not lie on a contract entered into on a Sunday, although entered into by an agent, and although the objection be taken by the party at whose request the contract was entered into. (7) Where a contract for the sale of goods, which had been delivered to the purchaser, was void by reason of its having been made on a Sunday, it was held that a subsequent promise to pay, entitled the vendor to recover the value. (8)

Drovers, waggoners, &c. not to come into inns on Sundays.

By stat. 29 Car. 2. c. 7. s. 2. no drover, horse courier, waggoner, butcher, higgler, their or any of their servants, shall travel or come into his or their inn or lodging, upon the Lord's day, or any part thereof, under the penalty of 20s. for every such offence.

Stat. 3 & 4 Gul. 4. c. 19. s. 26., stat. 2 & 3 Vict. c. 47. s. 51. Route of stage coaches, cattle, &c.

By stat. 3 & 4 Gul. 4. c. 19. s. 26. the court of aldermen, or two justices can regulate the route and conduct of persons driving stage carriages, cattle, sheep, pigs, and other animals in the streets and highways of the metropolis, during the hours of divine service, upon Sundays, Christmas-day, Good Friday, or any other days appointed for a public fast or thanksgiving; and by stat. 2 & 3 Vict. c. 47. s. 51. the commissioners of police within the

(1) 1 C. & J. 180. *Vide* Stephens on Nisi Prius, tit. BILLS OF EXCHANGE AND PROMISSORY NOTES, 781.

(2) *Rex v. Whitnash (Inhabitants of)*, 7 B. & C. 516.

(3) *Pente v. Dickens*, 3 Dowl. P. C. 171.

(4) *Ibid.*

(5) *Sandiman v. Breach*, 7 B. & C. 55.

(6) *Ibid.*

(7) *Smith v. Sparrow*, 4 Bing. 84. 2 C. & P. 511.

(8) *Williams v. Paul*, 6 Bing. 653.

metropolitan police district can regulate the route and conduct of persons driving stage carriages, cattle, &c. during divine service.

By stat. 9 Anne, c. 23. s. 20. & stat. 1 & 2 Gul. 4. c. 22. s. 37. any licensed hackney-coachman or his driver (1), or any chairman, can ply and stand with their coaches, hackney carriages, or chairs, and drive and carry the same respectively on the Lord's day.

The provisions of stat. 29 Car. 2. c. 7. s. 3. do not extend to the prohibition of dressing of meat in families, or dressing or selling of meat in inns, cook's-shops, or victualling houses, for such as otherwise cannot be provided (2), nor to the crying or selling of milk before 9 A. M., or after 4 P. M.

In the injunctions of Queen Elizabeth it was provided, that no inn-holders, or alehouse-keepers, shall use or sell meat or drink in the time of common prayer, preaching, or reading of the Homilies or Scriptures, which is taken from the Articles of Visitation, 2 Edw. 6.

By stat. 2 & 3 Vict. c. 47. s. 42. no licensed victualler, or other person, shall open his house within the metropolitan police district for the sale of wine, spirits, beer, or other fermented or distilled liquors on Sundays, Christmas-day, and Good Friday, before 1 P. M. except refreshment for travellers.

By stat. 7 & 8 Geo. 4. c. lxxv. watermen can, under certain limitations, ply for hire on the Thames upon a Sunday.

Where by a local act (6 Geo. 4. c. lxxi.) the company of proprietors of a public navigation were empowered to make bye-laws for the good government of the company, and for the good and orderly using the navigation, and also for the well governing of the bargemen, watermen, and boatmen, who should carry any goods, wares, or merchandise upon any part of the said navigation, and to impose and inflict such reasonable fines or forfeitures upon all persons offending against the same, as to the major part of the company should seem meet, not exceeding 5*l.*; and the company made a bye-law, that the navigation should be closed on every Sunday throughout the year, and that no business should be transacted thereon during such time (works of necessity only excepted), nor should any person during such time navigate any boat, &c.; nor should any boat, &c. pass along any part of the navigation on any Sunday, except for a reasonable distance for the purpose of mooring the same, and except on some extraordinary necessity, or for the purpose of going to, or returning from, any place of divine worship, under a penalty of 5*l.*: — It was held, that the act did not authorise the company to make the above bye-law, and that it was illegal and void. (3)

By stat. 29 Car. 2. c. 7. s. 5., if any person travel upon the Lord's day and be robbed, no hundred or the inhabitants thereof shall be charged (4) with or answerable for any robbery so committed; but the hundred after

SUNDAY.

Stat. 9 Anne,
c. 23. s. 20.
& stat. 1 & 2
Gul. 4. c. 22.
s. 37.

Hackney
coachmen.
Dressing or
selling meat.
Victualling
houses, &c.
Crying milk.

Stat. 2 & 3 Vict.
c. 47. s. 42.
Public houses
to be shut on
the mornings of
Sundays.

Stat. 7 & 8
Geo. 4. c. lxxv.
Watermen.

Stat. 29 Car. 2.
c. 7. s. 5.
The hundred
not responsible.

(1) *Vide* stat. 1 & 2 Gul. 4. c. 22. s. 37.

(2) *Rex v. Cox*, 2 Burr. 787., recognised in *Rex v. Younger*, 5 T. R. 449. *Vide post*, stat. 6 & 7 Gul. 4. c. 37. s. 14. & stat. 3 Geo. 4. c. cvi.

(3) *The Calder and Hebble Navigation Company v. Pilling*, 14 M. & W. 76.

(4) *Shall be charged*: — This clause was probably inserted, in consequence of a judicial opinion given in *Waite v. Stoke* (Hun-

dre-l of), (Cro. Jac. 496. 2 Rol. 59.), where the question was, whether one being robbed upon the Sunday morning, in time of divine service, and making hue and cry, and the hundred not producing any of the robbers, the said hundred should be chargeable by the statute? Croke, Doderidge, and Houghton held, that the hundred was chargeable; but Montague (Chief Justice) held the contrary.

SUNDAY.

to persons travelling on the Lord's day.

notice must make pursuit after the offenders, or they will be liable to forfeit to the Crown as much money as might have been recovered against the hundred by the party robbed, previously to the enactment of stat. 29 Car. 2. c. 7.

In *Tashmaker v. Edmonton (Hundred of)* (1), the plaintiff lived a mile from the church, and going thither with his lady in his coach upon a Sunday, was robbed, and brought his action against the hundred and recovered; for the statute extends only to the case of travelling; but the Court said, if he had been going to make visits, it might have been otherwise.

Recovery of penalties under stat. 29 Car. 2. c. 7.

By stat. 29 Car. 2. c. 7. s. 2., if any person offend against the act and be thereof convicted before any justice of the peace of the county, or the chief officer, or any justice of the peace of any borough, where the offences shall be committed, upon his or their view, or confession of the party, or proof of any one or more witnesses by oath, the justice, or chief officer shall issue a warrant under his hand and seal to the constables or churchwardens of the parish where such offence shall be committed, to seize the goods cried, showed forth, or put to sale, and to sell the same, and to levy the other forfeitures or penalties, by way of distress and sale of the goods of every such offender distrained, rendering to the offenders the overplus of the monies raised thereby. And all the forfeitures or penalties are to be employed and converted to the use of the poor of the parish where the offences have been committed; but any such justice, mayor, or head officer, out of the forfeitures or penalties, may reward any person who shall inform of any offence against the act, according to his discretion, so as such reward exceed not the third part of the forfeitures or penalties.

Stat. 29 Car. 2. c. 7. s. 6.
Service of temporal process.

By stat. 29 Car. 2. c. 7. s. 6. no person upon the Lord's day shall serve or execute any writ, process, warrant, order, judgment, or decree, except in cases of treason, felony, or breach of the peace; but the service of every such writ, process, warrant, order, judgment, or decree shall be void, and the person so serving or executing the same shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he had done the same without any writ, process, warrant, order, judgment, or decree. Thus, in *Knowles v. Richardson* (2) Kelynge J. said, "I have known many attachments for arresting a man upon a Sunday; but still the affidavit contained, that he might have been taken on another day;" to which Twisden J. added, "so for arresting a man as he was going to church, to disgrace him."

Service of ecclesiastical process.

A libel was exhibited in the Spiritual Court of Durham against a woman for incontinence, and the citation was fixed upon the church door on a Sunday, according to custom; upon which it was urged, as the opinion of civilians, that such citation was sufficient without any personal serving, and that it had been the constant practice both before and since this statute; and Chief Justice Holt said, if the ecclesiastical law was, and had always been, to serve this process on a Sunday (in which respect it was different from temporal process, which may be as well served on any other day), that then it did not seem to be the intent of this statute to take

(1) 1 Com. 345. 1 Str. 406.

(2) 1 MoJ. 55.

away the serving it in that manner, which is only meant of processes that may as well be executed at any other time. (1)

Where a justice of the peace gave a warrant to a constable to take a person, in order that he should find sureties for his good behaviour, and the constable executed the warrant on a Sunday; it was resolved, that such an arrest was legal, because a warrant for "good behaviour" is a warrant for the peace, and more; and that stat. 29 Car. 2. c. 7. was to be favourably interpreted for the peace. (2)

Contrivances may be used in order to execute the civil process of courts of justice; but such contrivances ought to be such as may be lawfully used in the execution of civil process, and an arrest by means of criminal process is not a lawful contrivance. Thus in *Wells v. Gurney* (3), where, by the contrivance of the plaintiff's attorney, a party had been arrested on a Sunday on criminal process, for the purpose of effecting his arrest on the civil process, the Court ordered him to be discharged out of custody.

By stat. 5 Anne, c. 9. it is lawful to apprehend and take upon the Lord's day any person by virtue of a warrant granted in pursuance of that statute, or of stat. 1 Anne, st. ii. c. 6.

A man may be arrested on a Sunday under an escape warrant; and a gaoler may retake upon a Sunday, on fresh pursuit, a prisoner who has escaped from him (4), unless the escape was voluntary. (5)

By stat. 2 Geo. 3. c. 15. all fish carriages are to be allowed to pass, and fish may be sold, on Sundays or holydays.

By stat. 6 & 7 Gul. 4. c. 37. s. 14., no master, mistress, journeyman, or other person exercising or employed in the trade or calling of a baker, out of the city of London and the liberties thereof, beyond the weekly bills of mortality and ten miles of the Royal Exchange, shall on the Lord's day make or bake any bread, rolls, or cakes of any sort or kind, or shall on any part of the said day, after half-past one o'clock, sell or expose to sale, or permit or suffer to be sold or exposed to sale, any bread, rolls, or cakes of any sort or kind; or bake or deliver, or permit or suffer to be baked or delivered, any meat, pudding, pie, tart, or victuals, or in any other manner exercise the trade or calling of a baker, or be engaged or employed in the business or occupation thereof, save and except so far as may be necessary in setting and superintending the sponge to prepare the bread or dough for the following day's baking; and every person offending against any of the foregoing regulations, and being thereof convicted before any magistrate or justice of the peace of the city, county, or place where the offence shall be committed, within six days from the commission thereof, either upon the view of such justice, or on confession by the party, or proof by one or more witness or witnesses upon oath or affirmation, shall for the first offence forfeit the penalty of 10s., for the second offence the penalty of 20s., and for the third and every subsequent offence respectively the penalty of 40s.; and shall moreover, on every such conviction, bear and pay the costs and expenses of the prosecution, such costs and expenses to be assessed, settled, and ascertained by the justice convicting;

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Arrest upon a warrant for "good behaviour."

An arrest on criminal process, will not be allowed to facilitate the execution of civil process.

Stat. 5 Anne, c. 9. When an arrest may be made.

Stat. 2 Geo. 3. c. 15.

Fish carriages.

Stat. 6 & 7 Gul. 4. c. 37.

s. 14.

Bakers.

(1) Gibson's Codex, 240. *Alanson v. Brookbank*, 5 Mod. 449. 2 Salk. 625.

(2) *Johnson v. Coltson*, Raym. (Sir T.), 250.

(3) 8 B. & C. 769.

(4) *Sir William Moore's case*, 2 Ld. Raym. 1028.

(5) *Atkinson v. Jameson*, 5 T. R. 25.

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and the amount thereof, together with such part of the penalty as such justice shall think proper, to the prosecutor, for loss of time in instituting and following up the prosecution, at a rate not exceeding 3s. per diem. and be paid to the prosecutor for his own use and benefit ; and the residue of such penalty to be paid to such justice, and within seven days after his receipt thereof to be transmitted by him to some one of the overseers of the poor, or to some other officer (as the convicting justices may direct) of the parish or place in which the offence shall have been committed, to be applied for the use of the general rate of the county ; and in case the whole amount of the penalty and of the costs and expenses be not paid within three days after the conviction of the offender, such justice shall, by warrant under his hand and seal, direct the same to be raised and levied by distress and sale of the goods and chattels of the offender ; or in default or insufficiency of such distress, to commit the offender to the house of correction, with or without hard labour, on a first offence, for the space of seven days, on a second offence for the space of fourteen days, and on a third or any subsequent offence for the space of one month, with or without hard labour, unless the whole of the penalty, costs, and expenses be sooner paid and discharged.

Stat. 3 Geo. 4.
c. cvi.

By stat. 3 Geo. 4. c. cvi. provisions essentially similar are made relating to bread to be sold in the city of London, and the liberties thereof, and within the weekly bills of mortality and ten miles of the Royal Exchange. (1)

Stat. 3 & 4
Gul. 4. c. 31.
Election of
public officers.

By stat. 3 & 4 Gul. 4. c. 31. (2), when the election of corporate offices and the election of officers for public companies are required by their charter to be held on a Sunday, the election must be held either on the Saturday preceding, or on the Monday following.

Stat. 6 & 7
Gul. 4. c. 58.
Bills of ex-
change and
promissory
notes.

By stat. 6 & 7 Gul. 4. c. 58., if the day following the day on which such bill of exchange shall become due shall happen to be on a Sunday, Good Friday, or Christmas-day, or a day appointed by his Majesty's proclamation for solemn fast or of thanksgiving, then it shall not be necessary that such bill of exchange shall be presented for payment, or be forwarded for such presentment for payment, to such acceptors or acceptor for honour, or referees or referee, until the day following such Sunday, Good Friday, Christmas-day, or solemn fast, or day of thanksgiving.

(1) *Vide* Stephens' Ecclesiastical Statutes, 1212.

(2) *Ibid.* 1535.

SUSPENSION. (1)

Defined—Suspension ab officio et beneficio—Penalty by the canon law upon a clergyman officiating after suspension—Suspension ab ingressu ecclesiæ—In what respects the two sorts of suspension agree—Ecclesiastical Courts prefer suspension to deprivation—By canon law admonition requisite previously to sentence—By whom sentence of suspension may be pronounced—Suspension during the investigation of the charge—Intermediate profits between charge and acquittal.

The laws of the church allude to two sorts of suspension—one relating solely to the clergy, the other extending also to the laity. Defined.

That which relates solely to the clergy is suspension ab officio et beneficio jointly, or ab officio, or beneficio, singly; and may be called a temporary degradation, or deprivation, or both. So we find it described by John de Athon (2): *Depositus dicitur, qui privatus est beneficio et officio, licet non sollemniter; degradatus dicitur, qui utroque est privatus sollemniter, insigniis sibi ablati; suspensus, qui est privatus utroque, ad tempus, non in perpetuum.* (3) Suspension ab officio et beneficio.

The penalty upon a clergyman officiating after suspension is thus set forth in the canon law: *Si quis presbyter, aut alius clericus fuerit degradatus, aut ab officio pro certis criminibus suspensus, et ipse per contemptum et superbiam aliquid de ministerio sibi interdicto agere præsumpserit, et postea ab episcopo suo correptus, in incepta præsumptione perduraverit, modis omnibus excommunicetur: et quicumque cum eo communicaverit, similiter se sciat esse excommunicatum.* (4) Penalty by the canon law upon a clergyman officiating after suspension.

The suspension which extends to the laity, is suspension ab ingressu ecclesiæ, or from the hearing of divine service and receiving the holy sacrament, which may, therefore, be called a temporary excommunication. (5) Suspension ab ingressu ecclesiæ.

(1) *Vide* tit. DEGRADATION — DEPRIVATION — EXCOMMUNICATION — MANDAMUS — PRIVILEGES AND RESTRAINTS OF THE CLERGY — PROHIBITION.

(2) Lyndwood, Prov. Const. Ang. 41.

(3) The following extracts from the canon law will illustrate the subject-matter of the text. —

1. Concerning the sense of the word *censura*: *Querenti, quid per censuram ecclesiasticam debeat intelligi, cum hujusmodi clausulam in nostris literis apponimus; respondemus, quod per eam non solum interdicti, sed suspensionis, et excommunicationis sententia valeat intelligi; nisi iudex discretus, rerum, et personarum circumstantiis indagatis, ferat, quam magis viderit expedire.* Extra. l. 5. t. 40. c. 20.

2. The previous admonition: *Præsenti decreto statuimus, ut nec prelati (nisi canonica commotione præmissa) suspensionis, vel excommunicationis sententiam proferant in subiectos, nisi forte talis sit culpa, quæ ipso suo genere suspensionis, vel excommunicationis prænam inducat. Nec sub-*

jecti contra disciplinam ecclesiæ vocem appellationis erumpant. Ibid. l. 2. t. 28. c. 26. In Archbishop Arundel's Register (429. (a).) mention is made of an appeal from a sentence of suspension as unjust, for want of a canonical monition.

3. That the sentence must be in writing: *Statutis generalibus jussimus, ut universi iudices, quibus reddendi juris in provinciis permisimus facultatem, cognitis causis ultimas definitiones de scripti recitatione proferant. Huic adjicimus sanctioni, ut sententia, quæ dicta fuerit, cum scripta non esset, nec nomen quidem sententiæ habere mereatur, nec ad rescissionem perperam decretorum, appellationis solennitas requiratur.* Caus. 2. q. 1. c. 8.

4. That both parties must be present: *Sententia ab ente aliâ parte, à iudice dicta, nullam obtineat firmitatem.* Caus. 3. q. 9. c. 11.

(4) Extra. l. 5. t. 27. c. 2.

(5) *Vide ante*, tit. BRAWLING AND SMITING *Cunning v. Suckins*, 2 Phil. 293. *Jarman v. Wise*, 3 Hagg. 360.

SUSPENSION.

In what respects the two sorts of suspension agree.

Ecclesiastical Courts prefer suspension to deprivation.

By canon law admonition requisite previously to sentence.

By whom sentence of suspension may be pronounced.

Suspension during the investigation of the charge.

Suspensions which relate to the clergy alone, and those that apply to the laity chiefly, agree in these respects; that both are inflicted for crimes of an inferior nature, viz. such as, in the first case, deserve not deprivation, nor, in the second case, excommunication; that both, in practice at least, are temporary, and both also terminate either at a certain time, when inflicted for such a time, or upon satisfaction given to the judge, when they are inflicted till something he has enjoined shall be performed; and lastly, that both (if unduly performed) are attended with further penalties; that of the clergy, with the punishment for irregularity, if they act in the meantime; and that of the laity with excommunication, if they do not in due time perform those things, the performance whereof such suspension was designed to enforce. (1)

The Ecclesiastical Courts, except in cases of great aggravation, prefer the sentence of suspension to that of deprivation: and suspension is never carried to such an extent in point of time, as would render it tantamount to deprivation; in fact, the Court would not be justified to itself in doing that indirectly, which it felt itself precluded from doing, openly and avowedly, by a precise sentence to that effect in the first instance.

By the ancient canon law sentence of suspension ought not to be given without a previous admonition (2), unless where the offence is such as in its own nature requires an immediate suspension; and if sentence of suspension in ordinary cases be given without such previous admonition, there may be cause of appeal.

The difference between suspension and deprivation consists in this—that the former may be pronounced by the chancellor of the diocese, the latter by the bishop alone. All chancellors can suspend. (3)

Under the Church Discipline Act the bishop can, if he think fit, suspend (4) the accused clerk until the accusation against him has either been established or rebutted. (5)

(1) Ref. Leg. 77. (a).

(2) It may be here observed that for a single act of drunkenness the Bishop of Exeter, *In re Landon (Clerk)* (Exeter, Nov. 4. 1847), sentenced the respondent to be admonished for his offence.

(3) *Watson v. Thorp*, 1 Phil. 277. The Dean of the Arches can deprive, but he alone of all ecclesiastical judges is vested with this power. Ibid.

(4) *Vide tit. PRIVILEGES AND RESTRAINTS OF THE CLERGY.* For cases in which clergymen have been suspended:—for drunkenness, vide *Rowland v. Jones*, 2 Lee (Sir G.), 191.; *Burder v. Speer*, 1 Notes of Cases Ecclesiastical, 39.; *Saunders v. Davies*, 1 Add. 291.; for habitual intoxication, and for having been convicted and imprisoned for an assault, *Lincoln (Bishop of) v. Day*, 4 Notes of Cases Ecclesiastical, 299.; for non-residence, vide *Paulk v. Head*, 2 Lee (Sir G.), 565, 566.; for immoral practices, *Watson v. Thorp*, 1 Phil. 269.; and in *Taylor v. Morley* (1 Curt. 470.), a clergyman for quarrelling and brawling was not suspended, but condemned in 75*l.* nomine expensarum.

(5) Respecting the intermediate profits between charge and acquittal, the following extract from a MS. book of Sir E. Simpson, formerly judge of the Admiralty, will afford an illustration:—“Offence.—Undoubted rule in Admiralty and Ecclesiastical Courts, that person suspended for an offence supposed, of which he is afterwards acquitted in proper court, is entitled to all the intermediate profits. Thus, in case of capture of prize at sea, the officer in arrest being actually on board, and afterwards duly acquitted, or restored to his station, shall share the prize money. So in civil cases in admiralty: if a master turns his mate, without just cause, before the mast, and he sue for wages as mate for the whole time, he may recover, though he did not do the duty. So if a clergyman be suspended *ab officio et beneficio*, and upon an appeal declared innocent, he will recover the profits of the living.

“Profits.—Person suspended from an office entitled to intermediate profits if innocent.” *Johnstone v. Sutton*, in error. 1 T. R. 526.

TITHES.

Generally — Statutes relating to tithes — By whom payable — To whom payable — Remedies for their recovery — Limitation of actions — Stat. 2 & 3 Gul. 4. c. 100. — What claims of modus decimandi to be valid in law — What is not a modus decimandi exemption or discharge from tithes under stat. 2 & 3 Gul. 4. c. 100. — Judgment of Chief Baron Pollock in KNIGHT v. WATERFORD (MARQUIS OF) — Claim of a modus decimandi from time immemorial may be pleaded, notwithstanding stat. 2 & 3 Gul. 4. c. 100. — A lay landowner under stat. 2 & 3 Gul. 4. c. 100. s. 1. can establish an exemption in non decimando by proof of non-payment — What will be deemed a valid composition for tithes within stat. 2 & 3 Gul. 4. c. 100. s. 2. — EVIDENCE — Certificate of tithe composition not stating to whom the composition was payable — Omission of the average price of corn does not vitiate the certificate — Where composition has not been appealed against, evidence cannot be produced to make the composition void ab initio — TITHE COMMUTATION ACTS — In fixing apportionment, regard must be had to the probability of the lands being converted from one species of culture to another — Where writ of habere fucias possessionem will be issued — Where the consolidation of actions will not be enforced — When the vicar must be rated as the occupier of land.

In consequence of the commutation of tithes under stat. 6 & 7 Gul. 4. **Generally.** c. 71., (amended by stat. 7 Gul. 4. & 1 Vict. c. 69., stat. 1 & 2 Vict. c. 64., stat. 2 & 3 Vict. c. 62., stat. 3 & 4 Vict. c. 15., stat. 5 & 6 Vict. c. 54., stat. 9 & 10 Vict. c. 73., & stat. 10 & 11 Vict. c. 104.), legal questions respecting tithes have recently been, and will in future be, of very rare occurrence: it may, however, be expedient succinctly to refer to the statutes and some of the decisions upon the subject. (1)

An estate in tithes is a title to a certain proportion or share of such **Defined.** titheable matters as may happen to arise annually upon the lands over which the right extends.

Tithes are divided into prædial, mixed, personal, great and small. **Prædial tithes** are such as arise merely and immediately from the vegetable produce of the land, such as of corn, hay, hemp, flax, grass, fruit, herbs, and wood; and with respect to which it may be observed, that by stat. 5 & 6 Gul. 4. c. 75. turnips severed from the land, for the purpose of being

(1) The following is a list of the statutes which have been recently enacted, relating to tithes in England. *Vide* Stephens' Ecclesiastical Statutes, 1680. Stephens on Nisi Prius, tit. TITHES, 2612.

Claims of <i>modus decimandi</i> , or exemption from or discharge of tithes, shortening the time required in	-	-	-	2 & 3 Gul. 4. c. 100.	} E.
Amended by	-	-	-	4 & 5 Gul. 4. c. 83.	
Commutation of tithes	-	-	-	6 & 7 Gul. 4. c. 71.	} E.
				7 Gul. 4 & 1 Vict. c. 69.	
				1 & 2 Vict. c. 64.	} E.
				2 & 3 Vict. c. 62.	
				3 & 4 Vict. c. 15.	
				5 & 6 Vict. c. 54.	
				9 & 10 Vict. c. 73.	
				10 & 11 Vict. c. 104.	
Merger of tithes in land, facilitating	-			1 & 2 Vict. c. 64.	} E.
Amended by	-	-	-	2 & 3 Vict. c. 62.	
Recovery of tithes, facilitating	-			53 Geo. 3. c. 127.	E.
				5 & 6 Gul. 4. c. 74.	E. & I.
				4 & 5 Vict. c. 36.	E.
Recovery of small tithes, amending 7 & 8 Gul. 3. c. 6. for the more easy	-	-	-	7 Geo. 4. c. 15.	E.
Turnips, amending the law as to the titthing of				5 & 6 Gul. 4. c. 75.	E.

TITHES.	consumed by sheep or cattle thereon, are made subject to tithe, as if not so severed. Mixed tithes are those which arise not immediately from the profits of the land, but from the produce and increase of animals nourished by the land; as of cattle, sheep, pigs, wool, milk, and eggs. Personal tithes are the profits which arise from the labour and industry of man in some trade or employment, being the tenth of the clear profits after deducting all expenses, as of mills, fish, &c. It is the nature, and not the quality, that makes a great or small tithe. (1) When the tithe of any thing is <i>magnus ecclesiæ proventus</i> , it is reckoned among the great tithes; where it is <i>parvus ecclesiæ proventus</i> , it is reckoned among the small tithes. Thus, the tithes of corn, hay, and wood are great tithes, because they are in general of much greater value than any other species of tithes; the prædial tithes of other less valuable vegetables, such as hops, potatoes, madder, woad, together with mixed and personal tithes, are small tithes.
Mixed tithes.	
Personal tithes.	
Great and small tithes.	

Where, on the trial of an action of debt for the treble value of prædial tithes, the plaintiff had proved the defendant's occupation of the land, the subtraction of the tithe, its single value, and that tithe had been previously paid in respect of land encroached from the same common, and the defendant called witnesses to prove exemption from tithe by reason of the barrenness of the land:—It was held, that although in the re-examination of a witness for the plaintiff, a question had been asked as to the fertility of the land, the plaintiff was entitled to adduce evidence in reply to disprove the defence. (2)

By whom payable.

The setting out or rendering of the tenth part of the yearly produce of the land, and of the animals that are depastured and kept upon the land, for the use of the person who is entitled to the tithes, is an obligation imposed by the law upon the occupier of the land, and upon the occupier of the land only. This obligation is, moreover, wholly personal; and, consequently, the demand of tithes, and all the remedies for the subtraction of them, are strictly personal.

**Stat. 2 & 3
Edw. 6. c. 13.
ss. 1—14.**

By stat. 2 & 3 Edw. 6. c. 13. s. 1. "every of the king's subjects shall truly and justly, without fraud or guile, divide, set out, yield, and pay all manner of their prædial tithes in their proper kind as they rise and happen, in such manner and form as hath been of right yielded and paid within forty years next before the making of this act, or of right or custom ought to have been paid. And no person shall take or carry away any such or like tithes which have been yielded or paid within the said forty years, or of right ought to have been paid in the places titheable of the same, before he hath justly divided or set forth for the tithe thereof the tenth part of the same, or otherwise agreed for the tithes with the parson, vicar, or other owner, proprietary or fermor, of the same tithes, under the pain of forfeiture of treble value of the tithes so taken or carried away."

Sect. 3.

By stat. 2 & 3 Edw. 6. c. 13. s. 3. "tithe of all cattle feeding in any waste whereof the parish is not known, shall be paid to the parson, &c. of the parish in which the owner of the cattle dwelleth."

Sect. 4.

By stat. 2 & 3 Edw. 6. c. 13. s. 4. "no person shall be sued or otherwise compelled to yield or pay tithes for any manors, lands, &c. which either by

(1) *Wharton v. Lisle*, 3 Lev. 365. 4 Mod. 183.

(2) *Gr. swolde v. Kemp*, 1 C. & M. 635.

the laws and statutes of the realm (1), or by any privilege or prescription (2), are not chargeable with the payment of tithes, or that be discharged by any composition real."

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By stat. 2 & 3 Edw. 6. c. 13. ss. 5 & 6., "if barren heath or waste ground, other than such as be discharged from the payment of tithes by act of parliament, which have before this time laid barren and paid no tithes by reason of the same barrenness, be hereafter improved and converted into arable ground or meadow, shall henceforth, after the end of seven years next after such improvements, pay tithes of corn and hay growing upon the same. But if any such barren waste or heath ground hath been charged with the payment of any tithes, and the same be improved or converted into arable ground or meadow, then the owner shall, during the seven years next following after the improvement, pay such kind of tithes as was paid for the same before the improvement."

Stat. 2 & 3
Edw. 6. c. 13.
ss. 5 & 6.

The great tithes, as of corn and hay, are generally payable to the rector or parson; the small tithes to the vicar. But the parson of one parish may claim by prescription a portion of tithes in the parish of another. (3) In places not within any parish, as in forests and waste lands, the king is entitled to the tithes, because he is not a mere layman, but *persona mixta*. (4) When the monasteries were dissolved by Henry VIII., the appropriation of the several benefices which belonged to them would by the rules of the common law have ceased; and they would have become disappropriated, had not a clause been inserted in all the statutes, by which the monasteries were given to the crown, to vest such interests. Such monastic tithes became lay fees, and laymen are capable of them in permanency, as the derivatives of the ecclesiastical bodies to whom they formerly belonged.

To whom payable.

Mere non-payment of tithes is no answer to a claim of tithes by a lay impropriator. (5)

In *Chapman v. Gatcombe* (6) it appeared that the defendant having in 1815 purchased the tithe of land of which he was seised in fee, in 1816, by a settlement on the marriage of his son, conveyed the land to trustees, for his son's wife, "together with all profits, commodities, advantages, emoluments, hereditaments, and appurtenances, to the premises belonging or in anywise appertaining, and the reversion, &c. and all the estate, right, title, interest, use, trust, possession, freehold, inheritance, reversion, possibility, property, challenge, claim, and demand whatsoever of him (the defendant) therein or thereto, or to any part or parcel thereof:"—It was held, that the tithes did not pass by this conveyance.

The action must be brought for the recovery of tithes by the party grieved, and executors can sue and be sued. (7)

Remedies for their recovery.

(1) *Vide* stats 27 Hen. 8. c. 20., 31 Hen. 8. c. 13., 32 Hen. 8. c. 7., and 37 Hen. 8. c. 12.

(2) *Vide* stat. 2 & 3 Gul. 4. c. 100.

(3) 1 Rol. Abr. *Dismes* (1), 657. pl. 1.

(4) *Bishop of Winchester's case*, 2 Co. 44.

(a) 2 Inst. 647.

(5) *Andrews v. Driver*, 2 Bing. N. C. 1. in error.

(6) *Ibid.* 516.

(7) In debt for tithe composition, effected under stat. 4 Geo. 4. c. 99., the plaintiff averred in his declaration, that the defendant was an occupier of lands, chargeable with the composition, having the first estate therein greater than a tenancy from year to year; to which it was pleaded, that the composition, to recover which the action was brought, accrued due after the 16th of August, 1832, and that the amount thereof

TITHES.

The demand must be made upon the person who was the owner of the crop at the time when it was severed from the ground; and therefore, if the occupier sell the crop standing, the purchaser is liable and not the occupier; because tithes are not in strictness payable in respect of the land, but in respect to the persons of the laity in return for spiritual benefits; they do not belong, nor are they appurtenant to, the land; they are not a profit issuing out of the land, as a rent is, but are collateral to, and wholly distinct from, the estate in the land. (1)

Stat. 32 Hen.
8. c. 7.

Before stat. 32 Hen. 8. c. 7. an action for tithes could not have been maintained in the temporal courts; but by sect. 7. of that statute it is enacted, that any person having an estate of inheritance, freehold, term, right, or interest in tithes, and being disseised, or otherwise kept or put out of possession thereof, shall have such remedy in the temporal courts for recovering the same as the case may require, in like manner as they may for lands, tenements, and other hereditaments.

Under this statute tithes have all the incidents appertaining to temporal inheritances: thus, an ejectment may be maintained for tithes. (2)

Stat. 7 & 8 Gul.
3. c. 6.

By stat. 7 & 8 Gul. 3. c. 6., made perpetual by stat. 3 & 4 Anne, c. 18. s. 1., and amended by stat. 7 Geo. 4. c. 15., a summary method of proceeding before two magistrates is given, for recovering small tithes under the value of 40s. (3)

Stats. 53 Geo. 3.
c. 127. s. 4. &
5 & 6 Gul. 4.
c. 74. s. 1.

By stat. 53 Geo. 3. c. 127. s. 4. the jurisdiction of two magistrates was extended to all tithes, oblations, and compositions subtracted or withheld, where the same should not exceed 10*l.* from any one person; and by stat. 5 & 6 Gul. 4. c. 74. s. 1., amended by stat. 4 & 5 Vict. c. 36., proceedings for the recovery of tithes under the yearly value of 10*l.*, except in the case of Quakers, must be under stat. 7 & 8 Gul. 3. c. 6. & stat. 53 Geo. 3. c. 127., except in cases where the actual title to any tithe, &c. shall be *bona fide* in question.

Since stat. 5 & 6 Gul. 4. c. 74., if any tithe, oblation, or composition not excepted in stat. 7 & 8 Gul. 3. c. 6., or exceeding 10*l.* yearly value due from any one person, is in arrear, it must be proceeded for before two justices; and if the title of the claimant, or liability of the party sought to be charged, be undisputed, two years arrears may be there recovered; but if such title or liability be denied *viva voce* before the justices, or at any time in writing, the claimant may proceed by suit in equity, and recover six years arrears. (4)

Stat. 7 & 8
Gul. 3. c. 34.
s. 4. & 53
Geo. 3. c. 127.
s. 6.

By stat. 7 & 8 Gul. 3. c. 34. s. 4. (5), (made perpetual and extended to all customary payments belonging to any church or chapel by stat. 1 Geo. 1. st. ii. c. 6.,) the like remedy is extended to all tithes due from Quakers; and two magistrates are empowered to ascertain what is due, and to order payment, so as the sum ordered does not exceed 10*l.*, and which was extended to 50*l.* by stat. 53 Geo. 3. c. 127. s. 6.

sought to be recovered did not exceed 20*l.* On demurrer to this plea it was holden that it was bad, and that the declaration was sufficient without an averment, that the defendant did not hold under a lease executed subsequent to the 16th of August, 1832. *Kellett v. Reilly*, 2 Jones (Irish), 1.

(1) Eagle on Tithe Commutation Act, 3d. ed. Intro. ix.

(2) *Baldwin v. Wine*, Cro. Car. 501.

(3) Vide *Rex v. Wakefield*, 1 Burr. 487.

(4) *Robinson (Clerk) v. Pardey*, 16 M. & W. 11.

(5) Vide *Rex v. Jeffery*, 2 D. & R. 260.

By stat. 5 & 6 Gul. 4. c. 74. s. 2., in the case of Quakers, no execution, or decree, or order shall be made against the person, but against the goods or other property of the defendant.

By stat. 2 & 3 Edw. 6. c. 13. s. 2. the rector, &c. or his servants are empowered to see that the tithe is justly set forth, and to carry away the same; and a remedy is given in the Ecclesiastical Court for the recovery of the double value of tithe subtracted with costs.

By stat. 8 & 9 Gul. 3. c. 11. s. 3., "in actions of debt upon the statute for not setting forth tithes, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles (6*l.* 13*s.* 4*d.*), the plaintiff obtaining judgment or any award of execution after plea pleaded or demurrer joined, shall recover his costs;" and "if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs."

By stat. 2 & 3 Gul. 4. c. 100. s. 1. "all prescriptions and claims of and for any modus decimandi, or of or to any exemption from or discharge of tithes by composition real or otherwise, shall in cases where the render of tithes in kind shall be hereafter demanded by the Crown, or by any Duke of Cornwall, or by any lay person not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained, and be deemed good and valid in law upon evidence, showing in cases of claim of a modus decimandi, the payment or render of such modus; and in cases of claim to exemption or discharge, showing the enjoyment of the land without payment or render of tithes, money, or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless in the case of a claim of a modus decimandi, the actual payment or render of tithes in kind, or of money or other thing differing in amount, quality, or quantity, from the modus claimed, or, in case of claim to exemption or discharge, the render or payment of tithes, or of money or other matter in lieu thereof, shall be shown to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of modus was made, or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefensible, unless it shall be proved that such payment or render of modus was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefensible upon evidence showing such payment or render of modus made or enjoyment had, as is hereinbefore mentioned, applicable to the nature of the claim for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto; provided always, that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to show such payment or render of modus made or enjoyment had, (as the case may be,) not only during the whole

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Stat. 5 & 6
Gul. 4. c. 74.
s. 2.
Stat. 2 & 3
Edw. 6. c. 13.
s. 2.

Stat. 8 & 9
Gul. 3. c. 11.
s. 3.

LIMITATION OF
ACTIONS.

Stat. 2 & 3
Gul. 4. c. 100.
s. 1.

What prescrip-
tions and claims
of modus de-
cimandi to be
valid in law.

TITHES.

What is not
a *modus deci-*
mandi ex-
emption, or
discharge from
tithes under
stat. 2 & 3
Gul. 4. c. 100.

Judgment of
Chief Baron
Pollock in
Knight v.
Waterford
(*Marquis of*).

of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the full period of sixty years, and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing."

In *Knight v. Waterford (Marquis of)* (1) it appeared, that there was a prescription for the lord of a manor to hold and enjoy the manor freed and discharged from tithe, on payment to the rector of the annual sum of 40*l.* in lieu and compensation of all tithes within the manor; and for the lord, in consideration of this payment of 40*l.* to have for himself, his heirs, or assigns, from the occupiers of lands within the manor, a tenth of all titheable matters within the manor; and it was held, that this was not a "*modus decimandi*, or exemption or discharge from tithes," within the meaning of stat. 2 & 3 Gul. 4. c. 100.; Chief Baron Pollock observing, "The question is, whether the prescription or right under which the defendant insisted on his non-liability to tithe in kind to the plaintiff, the rector, was 'a *modus*, exemption, or discharge' from tithe, under the 2 & 3 Gul. 4. c. 100. s. 2, and rendered valid by user for two incumbencies and three years of a third, and such further time as would make sixty years, under the provisions of the act? We are all of opinion that it was not a 'modus, exemption, or discharge,' and consequently there must be a new trial.

"The jury found that the defendant and his ancestors had, during the term mentioned in that statute, immediately preceding the commencement of the suit, held and enjoyed the lands in respect of the tithe of which the action was brought, freed and discharged of tithe, by reason of a payment by the lord of the manor of Ford of an annual sum of 40*l.*, payable as and for a sum payable, &c. from time immemorial, in lieu and compensation of all manner of tithes within the said manor; and that it was part of the same custom, that the lord, in consideration of the payment of 40*l.*, should have, to him, his heirs and assigns, a tenth of all titheable matters in the said manor, or any part thereof; and it is upon this finding, with reference to which the opinion of my brother Rolfe was given at the trial, that a question arises, whether it be within the statute or not? The right here claimed, if it has existed beyond time of legal memory, would (subject to an objection which will be afterwards noticed) be valid, upon the principle laid down in the cases of *Pigot v. Hearn* (2), *Pigot v. Simpson* (3), *Phillips v. Prytherick* (4), and *Dykes v. Thompson* (5); and though, in the first-mentioned case, *Pigot v. Hearn*, according to the report in Croke, the Court appear to have treated the prescription as consisting of two parts,—the first, a *modus* by the lord, for himself and tenants, to bar the parson from demanding tithes in specie; and the second, a prescriptive right in the lord to have the tenth sheaf, &c. not as tithes, but a temporal profit, in the nature of a rent-service from his tenants,—yet the judges of the court, in the subsequent case of *Pigot v. Simpson*, and Lord Coke's statement in the *Bishop of Winchester's*

(1) 15 M. & W. 419.

(2) Cro. Eliz. 599. S. C. nom. *Pigot v. Hearn*, Moore (Sir F.), 483.

(3) Cro. Eliz. 763.

(4) 3 E. & Y. 1273.

(5) 1 Ibid. 692.

case (1), put the decision upon a different ground, and treat the prescription as giving the lord a title, by the special matter, to the tithes as such, as appurtenant to his manor, with a right to sue for them in the Spiritual Court. And this appears to us to be the true principle of these decisions. The prescription gives a title to the lord to the tithes themselves arising in the manor, and the annual payment to the rector is the perpetual or 'prescriptive rent' (as it is termed in *Dykes v. Thompson*), given as the price or compensation for the parcel of tithes; and this view of the case was evidently taken by the House of Lords, on the appeal from the decree of my brother Alderson (reported 11th Clark & Finnelly), their lordships having treated the claim of the defendant, not as, properly speaking, a modus, but a claim of title to a parcel of tithes as against the parson; and therefore they reversed the decree, a court of equity not lending its assistance in such a case of disputed title to the tithes.

"This being, therefore, a prescriptive title to a parcel of tithes, and the immemorial payment a prescriptive rent for them, the statute appears to all of us not to apply.

"The pension is not a modus, according to the legal definition of that term (2); it is not given in satisfaction of tithes; for the occupier has always been liable to pay tithes, and has paid them, either by render or retainer, though not to the rector. A modus and a liability to pay tithe in kind for the same land cannot co-exist; they are absolutely inconsistent. Nor do we think, that this is a 'modus' in the sense of that term as used in the act, for we see no reason to believe, that the framer of the statute used it in any other than its proper sense; and this appears by sect. 1., which provides, that if a modus has been paid for thirty years, it may be defeated by showing the payment of tithes in kind, that is, the payment to any one; and the word must be used in the same sense in the subsequent part of the clause; so that a modus, in the sense given by the act, is as inconsistent with the render of tithe, as it is according to its proper legal acceptation; and it is clear that it is not an 'exemption or discharge,' the lands from which the tithe is claimed in this suit being liable to the payment of tithes, according to the alleged prescription.

"In truth, this is a contest between the rector and the lord as to the title to a parcel of tithes, admitted to be due from the occupier to some one. The statute never was meant to apply to disputed titles to the ownership of tithes, or to make a bad title to a parcel of tithes good. It was enacted in case of the occupier, who had not paid tithe in kind at all, but been totally exempt, or had paid something in lieu of it for a long period; and relief is given by shortening the time of prescription, and thus facilitating the proof of his title to exemption, or to pay the tithe otherwise than in kind.

"We all, therefore, think there must be a new trial, when the question to be decided on the whole evidence will be, whether the payment of 40*l.* a year was immemorial or not. If it should be proved to be such, the question will arise, whether the prescription for the lord and his assigns to take the tithes be good—a point which has not been fully argued, and upon which we do not feel called on to give any opinion in the present stage of the proceedings."

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Judgment of
Chief Baron
Pollock in
Knight v.
Waterford
(*Marquis of*).

(1) 2 Co. 42. (b).

(2) Case of modus decimandi, 13 *ibid.* 12.

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Claim of a
modus deci-
mandi from
time imme-
morial may be
pleaded not-
withstanding
stat. 2 & 3
Gul. 4. c. 100.

A lay land-
owner under
stat. 2 & 3
Gul. 4. c. 100.
s. 1. can
establish an
exemption in
non decimando
by proof of
non-payment.

What compo-
sitions for
tithes shall be
considered
valid.

What will be
deemed a valid
composition
for tithes
within stat.
2 & 3 Gul. 4
c. 100. s. 2.

In *Stamford (Earl of) v. Dunbar* (1) it was stated, that a claim of a modus decimandi, from time immemorial, may be pleaded notwithstanding stat. 2 & 3 Gul. 4. c. 100., and may be proved by the same evidence as would have been sufficient before the statute: but such claim will be liable to be defeated by showing payment of tithes in kind at any time within legal memory.

Under stat. 2 & 3 Gul. 4. c. 100. s. 1., a lay landowner can establish an exemption in non decimando by proof of non-payment for one of the periods named in the statute, without showing the legal origin of the exemption, the exemption being claimed, not in respect of all tithes (2), but in respect of particular articles, some being of modern introduction. (3) The judges were equally divided.

By stat. 2 & 3 Gul. 4. c. 100. s. 2., "every composition for tithes which hath been made or confirmed by the decree of any court of equity in England, in a suit to which the ordinary, patron, and incumbent were parties, and which hath not since been set aside, abandoned, or departed from, shall be and the same is, hereby confirmed and made valid in law; and that no modus, exemption, or discharge shall be deemed to be within the provisions of this act, unless such modus, exemption, or discharge shall be proved to have existed and been acted upon at the time of or within one year next before the passing of this act." (4)

The question, when an agreement will be deemed a valid composition for tithes within stat. 2 & 3 Gul. 4. c. 100. s. 2., will receive illustration from the following case:—

In 1711, William Plowden, lord of the manor and patron of the church of Aston-le-Walls, being seised in fee of certain lands lying dispersed in the common fields of Aston, and John Wilson being rector of that church, and in right thereof seised of other lands, also lying dispersed in such common fields, being the glebe lands belonging to the rectory, and also of the tithes as well of the said common fields as of the demesne lands of the said William Plowden, an agreement was made, on the 1st of March, 1711, under the hands and seals of the said William Plowden and the said John Wilson, by which it was agreed that the said William Plowden should convey to the said John Wilson and his successors, for ever, certain lands therein specified, to be enjoyed as the glebe lands held by the church and the rectors thereof, for ever; and also that the said William Plowden should grant to the said John Wilson and his successors, for ever, an annuity of 40*l.*, to be charged on his manors and lands: and the said John Wilson for himself, and, as far as in him lay, for his successors, agreed that the lands reputed as the glebe lands should thenceforth be possessed and enjoyed by the said William Plowden and his heirs, for ever; and also that all the lands of which the said William Plowden was the owner in Aston (including the lands the tithes of which were in question) should be freed and discharged from the payment of all manner of tithes, &c. Afterwards, on a petition to the ordinary, a commission was issued under which it was certified to the ordinary that the exchange would not be prejudicial to the rector, and he granted his licence for carrying it

(1) 13 M. & W. 822.

(2) As in *Fellows v. Clay* (Clerk),
4 Q. B. 313. 3 G. & D. 407.

(3) *Salkeld v. Johnson*, 2 C. B. 794.

(4) *Vide* stat. 4 & 5 Gul. 4. c. 83.

into effect. A bill in chancery was afterwards filed by William Plowden against John Wilson, the rector, and the bishop, the ordinary, in which suit a decree was made, in Trinity term, 1715, that the agreement should be performed and the exchange confirmed. In pursuance of this agreement, John Wilson took possession of the lands agreed to be conveyed by William Plowden, and enjoyed the same, and he and his successors received, as it became due, the annuity of 40*l.* until June, 1831, when Henry Thorpe became rector, and Thorpe himself received it until Michaelmas, 1832, but not afterwards. No tithes had been taken from the lands of William Plowden so exempted from tithes by the agreement from the making thereof, and the agreement, at the time of the passing of stat. 2 & 3 Gul. 4. c. 100., had not from the making thereof been set aside, abandoned, or departed from. The manor and all the lands of William Plowden descended to one Edmund Plowden before, and were in him on, the 10th of July, 1833, and so continued till his death in 1838, when they descended to one William Henry Francis Plowden. On the 7th June, 1833, a notice was served on certain occupiers, as well as Edmund Plowden, the owner, of the lands in question, requiring the tithes to be set out and paid in kind to Thorpe; and on the 10th of July, 1833, Henry Thorpe filed a bill in the exchequer against the occupiers, praying an account of the single value of the tithes, but no bill was then filed against Edmund Plowden, the owner of the lands; but by an order of the 15th January, 1835, the bill was amended, and Edmund Plowden was made a party defendant thereto. The cause having been heard, the bill was dismissed as against Edmund Plowden, but the Court directed that the occupiers should account for the tithes. Against that decree, the defendants, including Edmund Plowden, appealed to the House of Lords, and on the 6th February, 1840, the decree was reversed. Pending this appeal, actions of debt were brought by the plaintiff against the same occupiers, under 2 & 3 Edw. 6., to recover the treble value of the tithes of the same lands which accrued subsequently to those sought to be recovered by the bill in equity, and in such action the plaintiff was held entitled to recover, and the treble value of the tithes was paid accordingly.

A feigned issue having been brought under the 46th section of stat. 6 & 7 Gul. 4. c. 71., to try the validity of the decision of the Assistant Tithe Commissioner as to whether these lands were free from tithes, and a special case having been made for the opinion of the Court of Exchequer, stating the above facts, it was held, first, that the agreement of 1711 was a valid composition for tithes within the meaning of stat. 2 & 3 Gul. 4. c. 100. s. 2.; and secondly, that the proceedings and suits which took place in 1833, and subsequently, were not sufficient to take the case out of the statute, the plaintiff not having commenced any suit or action against Edmund Plowden within one year from the passing of the act, within the meaning of the third section. (1)

Stat. 3 & 4 Gul. 4. c. 27. for the limitation of actions (2) and suits relating to real property, extends to tithes (except tithes belonging to a spiritual or eleemosynary corporation sole); and by sect. 43. no person claiming any tithes, for the recovery of which he might bring an action or

Stat. 3 & 4
Gul. 4. c. 27.

(1) *Thorpe v. Plowden*, 14 M. & W. 520.

(2) *Vide* stat. 2 & 3 Gul. 4. c. 100.

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suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same, but within the period during which he might bring such action or suit at law or in equity.

In *Ely (Dean and Chapter of) v. Cash* (1) it was held, that stat. 3 & 4 Gul. 4. c. 27. did not operate to prevent the tithe owner from recovering tithes as chattels from the occupier, although none had been set out for twenty years, but that it is confined to cases where there are two parties, each claiming an adverse estate in the tithes.

EVIDENCE.

In an action of debt under stat. 2 & 3 Edw. 6. c. 13. for not setting out tithes, the plaintiff must establish, 1. his title as rector, lay impropriator, &c.; 2. the defendant's liability as an occupier of lands within the parish, &c.; 3. the value of the tithes.

A certificate of tithe composition, which does not state to whom the composition is payable, is *prima facie* valid, and the rector is the person entitled to the composition. (2)

The omission of the average price of corn in a certificate of tithe composition does not vitiate the certificate. Where a defendant in a suit for tithe composition is shown to be in possession of lands in the parish subject to composition, the onus of showing exemption lies upon such defendant. (3)

In an action of debt for arrears of tithe composition, if the composition be not appealed from, and the proceedings therein have been regular, the defendant, in Ireland, will not be permitted in that action to set up a title in a stranger to the composition, which, if established, would have the effect of making the composition void ab initio. (4)

In a suit for subtraction of tithes in the Spiritual Court by an impropriator, the defendant's personal answer stated a lease of them by the plaintiff to a third party, by whom they were demanded, and also that they belonged to the vicar, and not to the plaintiff. The defendant also put in a responsive allegation that, by immemorial usage, custom, and prescription, the tithes were deemed small or vicarial, and, as such, due to the vicar, and not to the plaintiff. The plaintiff's personal answer denied the usage as stated by the defendant, and the judge assigned a day to hear on the sufficiency of the plaintiff's answer, and term probatory to the defendant: it was held that, in this stage of the cause, there was no issue on the lease; that the only matter in issue, viz. the immemorial right of the vicar, was properly cognisable by the Spiritual Court; and that there was no ground of prohibition. (5)

Stat. 6 & 7 Gul. 4. c. 71., stat. 7 Gul. 4. & 1 Vict. c. 69., stat. 1 & 2 Vict. c. 64., stat. 2 & 3 Vict. c. 62., stat. 3 & 4 Vict. c. 15., stat. 5 & 6 Vict. c. 54., & stat. 9 & 10 Vict. c. 73. have given, in lieu of the right to tithes in kind which subsisted under the previously existing law, an annual sum of money in the nature of a rent charge issuing out of the land, and payable half-

(1) 15 M. & W. 617.

(2) *Lodge v. Creagh*, 1 Jones & Carey (Irish), 212.

It seems that a certificate of tithe composition under stat. 4 Geo. 4. c. 99. was considered as conclusive evidence, in an action against a tithe payer, of the title of the person named therein, as the person to

whom the composition is due and payable, to that composition. *Ashe v. Locke*, 2 Jones (Irish), 11.

(3) *Anon.* 1 Crawford & Dix (Irish), 12.

(4) *Ashe v. Locke*, *ibid.* 13.

(5) *Beauchamp (Earl) v. Turner*, 10 A. & E. 218.

Certificate of tithe composition, not stating to whom the composition was payable.

Omission of the average price of corn does not vitiate the certificate.

Where composition has not been appealed against, evidence cannot be produced to make the composition void ab initio.

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yearly, with powers of distress and entry upon the land in default of payment: and it may be here observed, that by stat. 10 & 11 Vict. c. 104. s. 3. instruments of apportionment may be corrected, if any lands have been improperly included, or charged with rent charge, therein.

Where, in proceedings before a tithe commissioner under stat. 6 & 7 Gul. 4. c. 71. s. 45., several moduses are set up in respect of distinct farms, and the annual value of the payment to be made in respect of each farm is less than 20*l.*, his decision is final, notwithstanding the whole is in the hands of the same proprietor, and the aggregate yearly value exceeds 20*l.* (1)

A modus, that in lieu of tithes arising out of lands in the occupation of any person not inhabiting within the parish, there should be a customary payment of 1*s.* per acre, and where the lands are in the occupation of a person inhabiting within the parish, there should be a like payment of 6*d.* per acre, is good. (2)

In *Reg. v. The Tithe Commissioners* (3) it appeared, that marsh lands in the parish of Appledore were covered from render in kind of all tithes, except the tithes of corn and grain, by a modus of 1*s.* per acre, but were subject to render in kind of the tithes of corn and grain to the appropriator; and all the other lands of the parish were covered from render in kind of all tithes, except the tithes of corn and grain, by a modus of 6*d.* per acre, but were subject to render in kind of the tithes of corn and grain to the appropriator. Certain prescriptive or customary payments were payable to the vicar instead of all the tithes, except the tithes of corn and grain. The valuer, chosen under stat. 6 & 7 Gul. 4. c. 71. s. 53. to apportion the rent charges payable to the impropriate rector and vicar respectively, charged 6*d.* an acre of the rent charge to be paid to the impropriate rector on those pasture lands held under the Dean and Chapter of Canterbury, which probably might be converted into arable. On appeal to the commissioners, it was objected, that the valuer had no power to charge any additional sum upon the pasture lands beyond the amount of the monies payable to the vicar: they delivered their judgment, that the objection was unfounded, and stated that they should confirm the apportionment. It was held, that prohibition would not lie, and that in fixing the apportionment regard was to be had to the probability of the lands being converted from one species of culture to another.

It is not necessary for the owner of the rent charge to bring an action of ejectment against the party in possession in the regular and ordinary course of law, as the statute gives him a summary remedy grounded upon an affidavit before one of the judges of any of the courts at Westminster, who is authorised to order a writ to be directed to the sheriff, requiring him to summon a jury to assess the arrears of the rent charge; and upon the return of the inquisition, the owner of the rent charge may sue out a writ of *habere facias possessionem* directed to the sheriff, commanding him to cause the owner of the rent charge to have possession of the land until the arrears, and the costs of the writ and inquisition, and the costs of cultivating and keeping possession of the land, shall be fully satisfied. (4)

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Stat. 10 & 11
Vict. c. 104.
s. 3.
Instruments
of apportion-
ment may be
corrected.

In fixing ap-
portionment,
regard must be
had to the pro-
bability of the
lands being
converted from
one species of
culture to
another.

Where writ of
habere facias
possessionem
will be issued.

(1) *Tomlinson (Clerk) v. Boughey (Sir F.)*,
1 C. B. 663.

(2) *Bridgewater (Mayor of) v. Allen*, 14
M. & W. 393.

(3) 10 Jurist, 836.

(4) *Eagle on Tithe Commutation Acts*,
3d ed. Introd. xi.

TITHES.
Where the consolidation of actions will not be enforced.

When the vicar must be rated as the occupier of land

In *Ward (Clerk) v. Pomfret* (1) an award was made by an assistant tithe commissioner under stat. 6 & 7 Gul. 4. c. 71. with respect to certain alleged district moduses. Both the vicar and the landowners of the parish being dissatisfied with the award, the vicar brought an action against one of the landowners, and seventy-four of the landowners brought actions against the vicar, in order to try the disputed right under issues to be directed pursuant to the 46th section of the statute. But the Court refused to order the seventy-four actions brought by the landowners against the vicar to abide the event of the action brought by him.

Under stat. 6 & 7 Gul. 4. c. 96. s. 1. the vicar of a parish receiving composition for small tithes is to be rated on such receipt in the same way as the occupier of land, that is, on the sum for which the same would let, free from tenant's rates and taxes and ecclesiastical dues. (2)

UNIONS AND DISUNIONS.

1. THE LAW AS IT EXISTED PREVIOUSLY TO STAT. 1 & 2 VICT. c. 106. pp. 1306—1309.

When churches may be united — Reasons for union in the canon law — The pope formerly granted unions — Stat. 37 Hen. 8. c. 21. & stat. 17 Car. 2. c. 3. — Common law not taken away by stat. 37 Hen. 8. c. 21. — That benefice to which the other is united is the superior — Where patronage vested — Patron of the most valuable church has the first turn — Tithes — Union does not unite parishes — Stat. 4 Gul. & M. c. 12. — Reparations of churches united — First-fruits and tenths — Union law tried.

2. THE LAW AS IT EXISTS UNDER STAT. 1 & 2 VICT. c. 106. pp. 1309—1313.

Repeal of stat. 37 Hen. 8. c. 21. & stat. 17 Car. 2. c. 3. — No union in future to take place except under stat. 1 & 2 Vict. c. 106. — UNION OF BENEFICES — Glebe lands may be excepted out of any united benefice to augment any adjoining poor benefice — Mode of conveyance — Approval of bishop — DISUNION OF BENEFICES — Provisions for disuniting united parishes — Incumbent may resign one or more of the disunited benefices, and patron may present — Portion of glebe, &c., may be assigned to each dissevered benefice — The portion so assigned shall belong to the incumbent — More than one house may be provided in disunited benefices — Existing benefice houses may be sold, and others built or purchased — Isolated places can be made separate benefices — Adjustment of disputes.

THE LAW AS IT EXISTED PREVIOUSLY TO STAT. 1 & 2 VICT. c. 106.
When churches may be united.

1. THE LAW AS IT EXISTED PREVIOUSLY TO STAT. 1 & 2 VICT. c. 106.

The union or consolidation of churches ought to be founded upon good canonical reasons.

By the common law, when churches are poor (3) and unable to support

(1) 1 M. & G. 559.
(2) *Reg. v. Capel (Clerk)*, 12 A. & E. 382.
(3) In 13 Hen. 3. the church of St. Peter's, in Chichester, being very poor, with only two parishioners, the king, at the request of Ralph Nevill, the then

bishop and chancellor of England, granted "quod eadem ecclesia demoliat, et predicti duo parochiani qui spectabant ad ipsam, assignentur in perpetuum hospitali S. Mariæ, quod eidem ecclesie est vicinum, ut ibi deinceps percipiant spiritualia, et sint parochiani ejusdem hospitalis." *Seld.* 267.

the charges to which they are subjected, they may be consolidated or united with the consent of the parson, patron, and ordinary. (1)

The consolidation or union, as it was called in the canon law, was permitted for the sake of hospitality, that the rector might thereby be better enabled to relieve the poor; in consequence of the vicinity of situation of several churches, on account of a want of parishioners, and extreme poverty in one or both of the parishes. (2)

The union is the act of the bishop or other superior. This is according to the definition *unio est beneficiorum seu ecclesiarum, ab episcopo, vel ab alio superiore, facta annexio.* (3)

The consent of the Crown is not necessary to a union; because it being an act of a spiritual nature was left to the discretion of the spiritual judges. (4)

The pope formerly granted unions; thus Alexander III. sent a decree to the Archbishop of York, by which, after reciting that in a complaint made to him, he had heard that a certain town in that province was so distant from the parish church, that it was very difficult for the inhabitants to repair thither, especially in winter, and withal that the church revenue of the parish, though the town should be exempted, would not be insufficient for the minister of the mother church, he commanded the archbishop to build a church in the town, and with the assent of the founder of the mother church, to institute, on the presentation of the rector, an incumbent there, who might have to his own use all ecclesiastical profits arising within the limits of the town, and acknowledge a superiority to the mother church; and this was to be done, whether the rector of the mother church assented or not. (5)

The statutes concerning the union of churches previously to stat. 1 & 2 Vict. c. 106. were stat. 37 Hen. 8. c. 21. & stat. 17 Car. 2. c. 3. (6)

By stat. 37 Hen. 8. c. 21. a union or consolidation of two churches in one, or of a church and chapel in one, the one of them not being above the yearly value of 6*l.* in the King's Books, and not distant from the other above one mile, might be made by assent of the ordinary, the incumbents, and of all such as had an interest in the patronage.

This statute was in affirmance only of the common law, and which was not affected by its provisions. (7)

That benefice to which the other is united is the superior and principal, although the inferior and accessory enjoys the same privilege that

THE LAW AS IT EXISTED PREVIOUSLY TO STAT. 1 & 2 VICT. c. 106.

Reasons for union in the canon law.

The pope formerly granted unions.

Stat. 37 Hen. 8. c. 21.

Common law not taken away by stat. 37 Hen. 8. c. 21.

That benefice to which the other is united is the superior.

(1) *Harman v. Renew*, 1 Salk. 165. *Austyn v. Twyne*, Cro. Eliz. 500. *Reynoldson v. Blake and London (Bishop of)*, 1 Ld. Raym. 192.

(2) Et temporis qualitas, et vicinitas nos locorum invitat, ut cumanam, atque miserationem unire debeamus ecclesias, quoniam nec longo itineris spatio à se se junctæ sunt, nec (peccatis facientibus) tanta populi multitudo est, ut singulos, sicut olim fuit, habere debeant sacerdotes. Quia igitur cumani castri sacerdos cursum vitæ hujus explevit, utraque nos ecclesias præsentis auctoritatis pagina unisse, tibi que commisi se cognosce; propriumque utrarumque ecclesiarum scito te esse pontificem. Et ideò te, quæcunque tibi de earum patrimonio, vel cleri ordinatione, sive promotione, juxta canonum sta-

tuta visa fuerint ordinare, atque disponere, habebis ut proprius revera sacerdos liberam ex nostræ auctoritatis consensu, atque permissione licentiam. Ubi verò commodius, atque utiliùs esse perspexeris, ibi habitato: ita sane, ut alteram ecclesiam, cui corporaliter præsens non es, sollicità, providenti-que curà disponas: quatenùs divina illic mysteria solenniter auxiliante Domino peragantur. Caus. 16. q. 1. c. 48. Gibson's Codex, 920.

(3) Gibson's Codex, 920.

(4) *Austyn v. Twyne*, Cro. Eliz. 501.

(5) Seld. 267.

(6) Vide Stephens' Ecclesiastical Statutes, 1836.

(7) *Austyn v. Twyne*, Cro. Eliz. 500.

THE LAW AS
IT EXISTED PRE-
VIOUSLY TO
STAT. 1 & 2
VICT. c. 106.

Where patron-
age vested.

Patron of the
most valuable
church has the
first turn.

Tithes.

Union does not
unite parishes.

Stat. 4 Gul. &
M. c. 12.
Reparations
of churches
united.

the more worthy benefice does, for the more worthy is never united to the minus dignum, and a parochial church therefore cannot be united to a chapel. (1)

By the union of two churches, no change is made in the advowsons. Patrons of united churches have several rights, for though there is but one advowson in right, yet every patron has the whole advowson in his turn, as the patronage remains; though by the union the incumbency of one church is extinguished, and the incumbency of the churches is united, the tithes, boundaries, moduses, and profits continue as before, for there can be no union of parishes, though there is of churches. (2) So where three parish churches were united by stat. 22 Car. 2. c. 11., the benefice may be described in pleading as one rectory. (3)

The patron of the most valuable church has the first presentment, and a subject patron of a benefice of the greatest value has his turn before the king patron of the lesser church. (4) But a presentment, time out of mind, by a patron of a rectory who has presented to his rectory with another chapel of which he happened to be the patron, will not have the effect of an union, but the church and the chapel remain distinct. (5)

After an union the ordinary may compel the parishioners to go to the church to which the union is made, and pay their tithes there. (6)

Where one church was united to another, it did not per se unite the parishes, but it was only an appropriation of one church to the other, so that the incumbent and his successors of the other church could be parsons of the church united. (7) And where an act of parliament created a new parish church and rectory, and directed the bishop to confer a certain prebend on the rector, and the prebend to remain united and annexed to the rectory for ever, it was held, that this was not such an appropriation of the rectory to the prebend as to make it an appropriate benefice within stat. 21 Hen. 8. c. 13. s. 31., and tenable with another benefice having cure of souls. (8)

If two churches parochial were united by the common law, the reparations remained distinct, and the inhabitants of the parish where the church was demolished were not obliged to contribute to the repairs of the remaining church to which they were united. (9) In consequence of which it was enacted by stat. 4 Gul. & M. c. 12. that where one of the churches united by stat. 17 Car. 2. c. 3. was at the time of such union, or afterwards demolished, then as often as the church which was made the church presentative, and to which the union was made, should be out of repair, or in need of decent ornaments for the performance of divine service therein, the parishioners of the parish whose church was then demolished were to pay towards the charges of such repairs and decent ornaments, such proportion as the archbishop or bishop making such union directed; and for

(1) Godolphin's Repertorium, 172.

(2) *Harman v. Renew*, 1 Salk. 165. *Fell-down v. Beale*, Carth. 238. *The parish of St. Swithin and St. Mary Bothaw*, Skin. 588.

(3) *Wilson q. t. v. Van Mildert (Clerk)*, 2 B. & P. 394.

(4) Com. Dig. tit. *Advowson*, F. 2. *Crooke's case*, 1 Show. 202.

(5) *Anon. Sav.* 17.

(6) *Reynoldson v. Blake and London (Bishop of)*, 1 Ld. Raym. 196.

(7) *St. Swithin's (Parish of) case*, Skin. 616.

(8) *Brazennose College v. Salisbury (Bishop of)*, 4 Taunt. 831.

(9) *Aston (Parish of) v. Castle Birminghams Chapel*, Hob. 66.

want of such direction, then one-third part of the charges of the repairs and ornaments were to be taxed and levied, as if it were for the reparation and finding decent ornaments for their own parish church, if no such union had been made.

THE LAW AS IT EXISTED PREVIOUSLY TO STAT. 1 & 2 VICT. c. 106.

The payment of first fruits and tenths, together with all other payments and dues to bishops and archdeacons, and the fees of institution, are reserved in perpetual unions, whether within the statutes or not. (1)

First-fruits and tenths.

After a union is made, if any question arise concerning its validity, it may be tried in the temporal courts, if it be within the statute law; but if such union be not within the statutes, but at common law, it must be tried by the spiritual courts. (2)

Union how tried.

2. THE LAW AS IT EXISTS UNDER STAT. 1 & 2 VICT. c. 106.

The law respecting the future union and disunion of benefices has been entirely changed by the provisions of stat. 1 & 2 Vict. c. 106. which, after repealing stat. 37 Hen. 8. c. 21. & stat. 17 Car. 2. c. 3., enacts by section 20., that from and after the 14th of August, 1838, it shall not be lawful to unite two or more benefices into one benefice, in any other form or manner, or under any other circumstances, than is thereinbefore provided; and that if any such union shall be made in any other form or manner, or under any other circumstances than as it is thereinbefore provided, it shall be void to all intents and purposes whatsoever.

THE LAW AS IT EXISTS UNDER STAT. 1 & 2 VICT. c. 106.
Stat. 1 & 2 Vict. c. 106.
Repeal of stat. 37 Hen. 8. c. 21. & stat. 17 Car. 2. c. 3.

By stat. 1 & 2 Vict. c. 106. s. 16., whenever it shall appear to the archbishop of the province, with respect to his own diocese, and whenever it shall be represented to him by the bishop of any diocese, or by the bishops of any two dioceses, that two or more benefices, or that one or more benefice or benefices, and one or more spiritual sinecure rectory or rectories, vicarage or vicarages, in his or their diocese or dioceses, being either in the same parish or contiguous to each other, and of which the aggregate population shall not exceed 1500 persons, and the aggregate yearly value shall not exceed 500*l.*, may with advantage to the interests of religion be united into one benefice, the archbishop is to inquire into the circumstances of the case; and if on such inquiry it appear to him that such union may be usefully made, and will not be of inconvenient extent, and that the patrons of the benefices, sinecure rectories, or vicarages, consent thereto in writing, he is, six weeks before certifying such inquiry and consent to her Majesty as thereafter directed, to cause, with respect to his own diocese, a statement in writing of the facts, and, in other cases, a copy in writing of the representation, to be affixed on or near the principal outer door of the church, or in some public and conspicuous place, in each of such benefices, sinecure rectories, or vicarages, with notice to any persons interested that they may, within such six weeks, show cause in writing under their hands to the archbishop against such union; and if no sufficient cause be shown within such time, the archbishop is to certify the inquiry and consent to her Majesty in council, and thereupon her Majesty can

UNION OF BENEFICES. Stat. 1 & 2 Vict. c. 106. s. 16.

(1) Gibson's Codex, 920.

(2) *Harman v. Renew*, 1 Salk. 165. 4 Burn's E. L. 46.

THE LAW AS
IT EXISTS
UNDER STAT.
1 & 2 VICT.
c. 106.

make an order for uniting such benefices, sinecure rectories, or vicarages, into one benefice, with cure of souls, for ecclesiastical purposes only; and give directions for regulating the course and succession in which the patrons shall present or nominate to such united benefice, and for determining, if it be in two dioceses, to which of such dioceses it shall belong; and such orders are to be registered in the registry or registries of the diocese or respective diocese to which such benefice shall be determined to belong, and to which either or any of the benefices, sinecure rectories, or vicarages united, shall have belonged when separate, and will thenceforth be binding on all parties; and if at the time of the registration of such orders all the benefices, sinecure rectories, or vicarages ordered to be united shall not be holden by the same incumbent, then if any of them shall at such time be vacant, and if not, then upon every avoidance, until all the benefices, sinecure rectories, or vicarages but one shall come to be holden by the same incumbent, the patron of the vacant benefice, sinecure rectory, or vicarage, will be bound to present or nominate, and the bishop bound to admit and institute or license, to the vacant benefice, sinecure rectory, or vicarage, the incumbent of the other or one of the other benefices, sinecure rectories, or vicarages so ordered to be united; and if all shall be holden by the same incumbent at the time of the registration of such orders, or all but one of the benefices, sinecure rectories, or vicarages be vacant, then immediately, or otherwise on the first avoidance of either or any of such benefices, sinecure rectories, or vicarages after all but one shall have come to be holden by the same incumbent, the benefices, sinecure rectories, or vicarages, will become permanently united together, and be deemed and taken to be one benefice, with cure of souls, unless afterwards disunited in the manner thereafter enacted: but notwithstanding any such union the parishes or places of which the united benefice shall consist are to continue distinct as to all secular rates, taxes, charges, duties, and privileges, and in all other respects except as thereinbefore specified.

Stat. 1 & 2
Vict. c. 106.
s. 17.
Glebe lands
may be excepted out of any united benefice to augment the provision for any other adjoining poor benefice by an exchange in such manner that the augmentation shall be situate within the limits of such other benefice.

And by stat. 1 & 2 Vict. c. 106. s. 17., when it shall further appear to the archbishop of the province, with respect to his own diocese, or it shall be further represented to him by the bishop of any other diocese, that the total income of any benefice or benefices, sinecure rectory or rectories, vicarage or vicarages, proposed to be united, would be larger than sufficient for the due maintenance and support of the incumbent of the benefice when united, and that the whole or some specified part or parts of the glebe lands, tithes, rent charges, tenements, and hereditaments belonging to the benefice or benefices, &c. proposed to be united, or any of them, might and could, with advantage to the interests of religion, be excepted out of such union, and be exchanged for certain other lands, tithes, &c. in some other specified benefice situate in the same diocese, and having no competent provision belonging thereto, and that the lands, tithes, &c. proposed to be given in exchange for such excepted lands, tithes, &c. might with like advantage be granted, conveyed, and assured as a further perpetual endowment for the incumbent of such last-mentioned benefice, and that the patron of the benefice, &c. and the incumbent or incumbents for the time being thereof respectively, or of such thereof as shall not be then vacant, and the owners, or impropiators of

such lands, &c. so proposed to be given in exchange are consenting thereto, such consent being signified in writing under their respective hands, the archbishop, after inquiring into such further matter, can certify such further circumstances to her Majesty in council, and thereupon her Majesty can direct such first-mentioned lands, tithes, &c. to be excepted out of such united benefice, and to be granted, conveyed, and assured unto such owner or impropriator in exchange for an equal value of lands, tithes, &c. situate or arising within the limits of such benefice, to be by him granted for the further endowment of such other benefice; and such orders are to be registered in the registry of the diocese to which such united benefice and other benefice shall belong, and will thenceforth be binding on all parties; and such lands, tithes, &c. so directed to be granted, &c. will, immediately after the execution and enrolment in manner thereafter directed of the deeds or instruments thereafter mentioned, be for ever freed and discharged of and from all estate, right, title, and interest whatsoever of the incumbent for the time being of the benefice, sinecure rectory, or vicarage so to be united, and be liable to the uses, trusts, estates, and charges to which the lands, tithes, rent charges, tenements, or other hereditaments so granted, conveyed, or assured by such owner or owners, impropriator or impropriators, for such further endowment, may at the time of such execution have been subject or liable; and such last-mentioned lands, &c. so granted, will be for ever annexed to the benefice for the further endowment of which they shall have been granted, and be held for ever by the incumbent for the time being thereof, as part of the endowment thereof, freed and discharged from all uses, trusts, estates, and charges whatsoever.

THE LAW AS
IT EXISTS
UNDER STAT.
1 & 2 VICT.
c. 106.

By stat. 1 & 2 Vict. c. 106. s. 18., all such grants, conveyances, and assurances are to be made by deeds or instruments in writing, under the hand and seal or hands and seals of the patron of the benefice, sinecure rectory, or vicarage affected thereby, and of the owner or impropriator of the lands, tithes, &c. so to be given in exchange; and the bishop of the diocese for the time being is to testify his approval thereof by being a party and affixing his episcopal seal thereto; and the incumbent or incumbents for the time being of such of the benefices, sinecure rectories, or vicarages as shall not be then vacant, are to testify his or their approval by being a party or parties to and signing the same respectively, and must be the party or parties by whom the grant, conveyance, and assurance to be made or executed to such owner or impropriator, shall be made and executed; and such deeds or instruments are to be enrolled in Chancery within six calendar months after the execution thereof respectively, or else have no operation under the act.

Stat. 1 & 2
Vict. c. 106.
s. 18.
Conveyances in
exchange to be
by deed in writ-
ing under the
hands and seals
of all parties in-
terested. to be
enrolled in
Chancery.

By stat. 1 & 2 Vict. c. 106. s. 19., the approval of the bishop is to be conclusive that the lands, tithes, rent charges, tenements, and hereditaments so to be granted, conveyed, and assured, were respectively of the proper value required by the act, and were respectively granted, conveyed, and assured in due accordance with its provisions.

Stat. 1 & 2
Vict. c. 106.
s. 19.
Approval of the
bishop.

By stat. 3 & 4 Vict. c. 60. s. 21., the provisions of stat. 1 & 2 Vict. c. 106., as to the parties to be considered patrons, and to the mode of giving consents, are to apply to stat. 3 & 4 Vict. c. 60.

Stat. 3 & 4 Vict.
c. 60. s. 21.

THE LAW AS
IT EXISTS
UNDER STAT.
1 & 2 VICT.
c. 106.

Stat. 1 & 2
Vict. c. 106.
s. 21.
DISUNION OF
BENEFICES.
Provisions for
disuniting
united parishes.

Stat. 1 & 2 Vict. c. 106. s. 21., after reciting, that from the increase of population, or from other circumstances, it may be expedient that two or more benefices which have been heretofore united, or which may be hereafter united under the provisions of the act, should be disunited: enacts, that when two or more benefices have been united or may be hereafter united into one benefice, and, with respect to his own diocese, it shall appear to the archbishop of the province, or the bishop of any diocese shall represent to the archbishop of the province, that one or more of the benefices within his diocese of which such united benefice shall consist, may be separated therefrom with advantage to the interests of religion, the archbishop shall inquire into the circumstances of the case, and if on such inquiry it shall appear to him that such union may be usefully dissolved, so far as respects such benefice, or benefices, he shall, six weeks at least before certifying such inquiry to her Majesty as thereafter directed, cause with respect to his own diocese a statement in writing of the facts and in all other cases a copy in writing of the representation to be affixed on or near the principal outer door of the church or in some public and conspicuous place in each of the benefices forming part of the united benefice, with notice to any person or persons interested that he, she, or they may within six weeks show cause in writing under his, her, or their hands to the archbishop against any such disunion: and if no sufficient cause be shown within such time the archbishop shall certify the inquiry and consent, when the patron's consent is necessary, to her Majesty in council, and thereupon her Majesty can issue an order for separating such last-mentioned benefice from such united benefice, and for declaring the rights of patronage of the several patrons if there be more than one patron, and such order shall be registered in the registry of the diocese to which such united benefice shall belong; and thereupon immediately, if such united benefice shall be then vacant, otherwise on the first avoidance thereof, such union shall be *ipso facto* dissolved so far only as regards such benefice so proposed to be separated from such united benefice, but in all other respects shall remain in full force, and thenceforward such last-mentioned benefice or benefices shall be taken to be a separate and distinct benefice or benefices as if no such union had taken place, and the patron thereof may, according to the terms of such order, present or nominate thereto respectively, and upon every avoidance of the same: provided that no benefices which have been united for more than sixty years before the passing of the act shall be disunited without the patron's consent in writing.

Stat. 1 & 2
Vict. c. 106.
s. 22.
Incumbent may
resign one or
more of the dis-
united bene-
fices, and patron
may present.

Stat. 1 & 2 Vict.
c. 106. s. 23.
Portion of
glebe, &c., may
be assigned to
each dissevered
benefice.

By stat. 1 & 2 Vict. c. 106. s. 22., in any case in which her Majesty in council shall have issued any order for separating one or more benefices from such a united benefice, the incumbent thereof, if such united benefice be full at the time of issuing such order, can resign the benefice so proposed to be separated from such united benefice; and thereupon the respective patron of such last-mentioned benefice can present thereto, as if such united benefice had been vacant at the time of issuing such order.

By stat. 1 & 2 Vict. c. 106. s. 23., whenever two or more benefices which have at any time been united into one benefice shall be disunited and become separate benefices under the provisions of the act, whether the order for disunion shall extend to the whole number of benefices of which such united benefice consisted, or to one or more of such benefices only,

her Majesty in council, on the recommendation of the archbishop of the province, with the written consent of the patron of such benefices respectively, can assign and attach such portion of the glebe lands, tithes, moduses, rent charges, or other endowments or emoluments belonging to or arising or accruing within the limits of such united benefice to each of such benefices respectively, notwithstanding such proportion of glebe land, tithes, rent charges, &c. may not accrue within the limits of the benefice to which the same shall be so assigned and attached, or may not have belonged thereto, and also to divide and apportion between such benefices all such charges and outgoings as before the disunion thereof were imposed upon the whole united benefice, and in the case of mortgages with the consent of the mortgagees in writing under their hands and seals.

THE LAW AS
IT EXISTS
UNDER STAT.
1 & 2 VICT.
c. 106.

By stat. 1 & 2 Vict. c. 106. s. 24., all lands, tithes, rent charges, moduses, or other endowments or emoluments, when so assigned and attached, are to belong to, and the same and the rents and profits thereof to be recoverable by, the incumbent of the benefice to which the same shall have been so assigned and attached.

Stat. 1 & 2
Vict. c. 106.
s. 24.
The portion so
assigned shall
belong to the
incumbent.

Stat. 1 & 2 Vict. c. 106. s. 25., after reciting that by stat. 1 & 2 Vict. c. 23. provision was made in certain cases for selling the residence house and appurtenances belonging to any benefice, together with a certain portion of land contiguous thereto, and for applying the proceeds of such sale to the erection or purchase of some house, or the purchase of an orchard, garden, or land for the residence and occupation of the incumbent of such benefice: and that it might happen that in the case of benefices disunited under the provisions of the act, or divided or separately endowed under stat. 58 Geo. 3. c. 45. & stat. 59 Geo. 3. c. 134., the existing benefice house may be inconveniently situated for any one of such disunited parishes, or of the divisions of such divided benefices, or may be on too large and expensive a scale to be conveniently maintained by the incumbent of any such disunited or divided benefice; enacts, that all the provisions of stat. 1. & 2 Vict. c. 23. relating to the sale of the house, gardens, orchards, appurtenances, or land attached to any benefice, and the application of the proceeds of such sale, shall be applicable to the case of any benefice divided or separately endowed under the provisions of stat. 58 Geo. 3. c. 45. & stat. 59 Geo. 3. c. 134., and of any benefice disunited under the provisions of the act; and that the proceeds of such sale may be applied by the governors of the Bounty of Queen Anne towards the erection or purchase of houses, gardens, or appurtenances, or of so much land as shall be required for the residence of an incumbent, within each of the parishes so disunited, or each of the divisions of the benefices so divided, in such proportions within each such benefice respectively as shall be approved by the archbishop of the province, with the consent of the patron and ordinary, and (if the benefice be full) of the incumbent of the benefice, such consents to be signified in writing under their respective hands, and to be confirmed by her Majesty in council.

Stat. 1 & 2
Vict. c. 106.
s. 25.
More than one
house may be
provided in
disunited bene-
fices.

Existing bene-
fice houses may
be sold, and
others built or
purchased.

By stat. 1 & 2 Vict. c. 106. s. 26. (1) & stat. 2 & 3 Vict. c. 49. s. 6. (2) isolated places can be made separate benefices, and by stat. 1 & 2 Vict. c. 106. s. 27. (3) powers are given to adjust disputes.

Adjustment of
disputes.

(1) *Ante*, 866. 893.

(2) *Ibid.* 855.

(3) *Ibid.* 866.

VAULTS AND CEMETERIES.

ENACTMENTS OF STAT. 10 & 11 VICT. c. 65.—*Extent of act*—*Construction of the words of the act*—*Citing the act*—*Portions of the act may be incorporated in other acts*—**MAKING OF CEMETERY**—*Construction of cemetery to be subject to the provisions of the act, and the Lands Clauses Consolidation Act of 1845*—*Errors and omissions in act or schedule to be corrected by justices*—*Copies of plans, &c. to be evidence*—*Company not to dispose of any land consecrated or used for burial*—*Cemetery not to be within a certain distance of houses*—*Company may build chapel, &c.*—*Company may make or widen roads to cemetery*—*No road to be widened without consent*—*Owners, &c. may enter into agreements for improving roads for that purpose*—*Cemetery to be inclosed and fenced*—*Cemetery, &c. to be kept in repair*—*Company to make compensation for damages done*—**PREVENTION OF NUISANCES**—*Power to make sewers, drains, &c. in and about the cemetery*—*Certain provisions of Waterworks Clauses Act, 1847, incorporated with the act*—*Penalty for allowing water to be fouled*—*Penalty to be sued for within six months*—*In addition to penalty of 50*l.*, a daily penalty during the continuance of the offence*—**BURIALS**—*A part of cemetery to be set apart and consecrated for burial of mem'ers of Established Church*—*Consecrated ground to be defined*—*A chapel in connexion with the Established Church to be constructed*—*Bodies when interred not to be removed without lawful authority*—*Chaplain to be appointed with consent of the bishop*—*Chaplain to perform burial service when required*—*Other clergymen of the Established Church may be allowed to officiate*—*Company to pay the chaplain a stipend approved by the bishop*—*Stipend to be recovered by action at law*—*Burials in the consecrated portion to be registered by the chaplain*—*Registers to be subject to the regulations of stat. 6 & 7 Gul. 4. c. 86. as to searches, &c.*—*Clerk appointed for the consecrated part of the cemetery*—*As to burial of persons not members of the Church of England*—*Company may allow any burial service to be performed in dissenting chapels*—*Power to appoint grave-diggers, &c.*—*Regulations for ensuring decency and solemnity*—*No burials under or close to chapels*—**EXCLUSIVE RIGHTS OF BURIAL**—*Parts of the cemetery may be set apart for exclusive burial*—*Monumental inscriptions*—*Plan and book of reference to be kept, and be open to inspection*—**FORM OF GRANT OF RIGHT OF BURIAL**—*Form of grant of burial in vault, &c. to be according to schedule*—*Register of grants to be kept*—*Rights of burial, &c. to be assignable, or may be bequeathed by will*—**FORM OF ASSIGNMENT OF RIGHT OF BURIAL**—*Form of assignment*—*Assignments to be registered*—*Probates of wills to be registered*—*Vaults to be kept exclusively for purchasers of exclusive right*—*No such grant to give the right of burial in consecrated ground to certain persons*—*Power to remove monuments improperly erected*—*Bishop to have power to object to monumental inscriptions in consecrated part of cemetery*—**PAYMENTS TO INCUMBENTS OF PARISHES**—*Payments to incumbents of parishes from which bodies are brought*—*Company to keep an account of interments*—*Account of payments due to incumbents of parishes to be rendered half yearly*—*Fees to be paid to incumbents of parishes half yearly*—*Payment to be made to the incumbent for the time being, who is to account with his predecessor*—*Company to pay parish clerks the compensation mentioned*—**PROTECTION OF CEMETERY**—*Penalty for damaging the cemetery*—*Penalty on persons committing nuisances in the cemetery*—**ACCOUNTS**—*Annual account to be made up, and a copy transmitted to the clerk of the peace, &c., and to be open to inspection*—*Tender of amends*—**RECOVERY OF DAMAGES AND PENALTIES**—*Stat. 8 & 9 Vict. c. 20. incorporated as to damages, &c.*—*In Ireland part of penalty to be paid to guardians of unions*—*All things required to be done by two justices may, in certain cases, be done by one*—**PERJURY**—*Persons giving false evidence liable to penalties of perjury*—**ACCESS TO SPECIAL ACT**—*Copies of special act to be kept by company at their office, and deposited with the clerk of the peace, and be open to inspection*—*Penalty on company failing to keep or deposit such copies*—*Company not exempt from provisions of any future general act.*

With the exception of the enactments of stat. 10 & 11 Vict. c. 65. the law as to vaults and cemeteries has been previously discussed under the titles of BURIAL (1) and CHURCHYARDS (2); it will therefore only now be requisite to direct attention to the provisions of that statute.

(1) *Ante*, 187—221.(2) *Ibid.* 366—368.

Stat. 10 & 11 Vict. c. 65. s. 1., after reciting, that it was expedient to comprise in one act sundry provisions usually contained in acts of parliament authorising the making of cemeteries, and that as well for avoiding the necessity of repeating such provisions in each of the several acts relating to such undertakings, as for insuring greater uniformity in the provisions themselves, enacts, that the act shall extend only to such cemeteries as may be authorised by any act of parliament thereafter to be passed which shall declare that this act shall be incorporated therewith, and all the clauses of this act, save so far as they shall be expressly varied or excepted in any such act, shall apply to the cemetery authorised thereby, so far as they are applicable to such cemetery, and shall, with the clauses of every other act incorporated therewith, form part of such act, and be construed therewith as forming one act.

VAULTS AND CEMETERIES.

Ss. 1—5.
Extent of act.

Sections 2 & 3. apply to the construction of the words of the act; and with respect to citing the act, section 4. makes it sufficient, in citing the act in other acts of parliament, and in legal instruments, to use the expression "the Cemeteries Clauses Act, 1847."

Construction of the words of the act.

Section 5. contains provisions as to the form in which portions of the act may be incorporated in other acts.

Sect. 5.
Portions of the act may be incorporated in other acts.

With respect to the making of cemeteries — where a company (1) is empowered, for the purpose of making a cemetery (2), to take lands otherwise than with the consent of the owners and occupiers thereof, they shall be subject to the provisions and restrictions contained in the act and the Lands Clauses Consolidation Act of 1845, and must make to the owners and occupiers of, and all other parties interested in, such lands (3), or injuriously affected by the construction of the works, full compensation for the value of the lands so taken or used, and for all damage sustained; and, except where otherwise provided, the amount of such compensation is to be determined in the manner provided by the Lands Clauses Consolidation Act, 1845, for determining questions of compensation with regard to lands purchased or taken under its provisions.

MAKING OF CEMETERY.
Ss. 6—17.

Sect. 6.
Construction of cemetery to be subject to the provisions of the act and the Lands Clauses Consolidation Act of 1845.

If any omission, mis-statement, or wrong description have been made of any lands, or of the owners, lessees, or occupiers of any lands described in the special act or the schedule thereto, the company, after giving ten days' notice to the owners of the lands affected by such proposed correction, can apply to two justices for the correction thereof, and if it appear to such justices that the omission, mis-statement, or wrong description arose from mistake, they can certify the same accordingly, and state in such certificate the particulars thereof; and the certificate must be deposited with the clerk of the peace of the county in which the lands affected thereby are situated, and thereupon the special act (4) or schedule will be deemed to be corrected according to such certificate, and the company may take the lands

Sect. 7.
Errors and omissions in act or schedule to be corrected by justices.

(1) *Company*: — The persons by the special act authorised to construct the cemetery.

(2) *Cemetery*: — The cemetery or burial ground, and the works connected therewith, by the special act authorised to be constructed.

(3) *Lands*: — This word will include

messuages, lands, and hereditaments of any tenure.

(4) *Special act*: — This expression will apply to any act which may hereafter be passed authorising the making of a cemetery, and with which this act may be incorporated.

VAULTS AND CEMETERIES.

Sect. 8.
Copies of plans, &c. to be evidence.

according to the certificate, as if such omission, mis-statement, or wrong description had not been made.

Copies of any alteration or correction of the special act, or the schedule thereto, or of any extract therefrom, certified by the clerk of the peace in whose custody such alteration or correction may be, which certificate such clerk of the peace is to give to all parties interested, when required, is to be received as evidence of the contents thereof.

Sect. 9.
Company not to dispose of any land consecrated or used for burials.

The company are not to sell or dispose of any land which shall have been consecrated or used for the burial of the dead, or make use of such land for any purpose, except such as shall be authorised by act of parliament.

Sect. 10.
Cemetery not to be within a certain distance of houses

No part of the cemetery is to be constructed nearer to any dwelling house than the prescribed (1) distance, or if no distance be prescribed, it must then be distant 200 yards, except with the consent in writing of the owner, lessee, and occupier of such house.

Sect. 11.
Company may build chapels, &c.

The company may build upon any land, which by the special act they are authorised to use for the purposes of the cemetery, such chapels for the performance of the burial service as they think fit, and may lay out and embellish the grounds of the cemetery as they think fit.

Sect. 12.
Company may make or widen roads to cemetery.

The company may make upon any land, purchased by them under act of parliament, any new roads to the cemetery, or widen or improve any existing roads thereto which they think fit.

Sect. 13.
No road to be widened without consent.

Provided that the company do not widen or improve any existing road without the consent of the owner thereof, if the road be private, or if the road be public, without the consent of the persons in whom the management of the road is vested by law.

Sect. 14.
Owners, &c. may enter into agreements for improving roads for that purpose.

The company and the owners or persons having the management of any such road may enter into such agreements as they think fit, for enabling the company to widen or improve any such road, and for maintaining the same.

Sect. 15.
Cemetery to be inclosed and fenced.

Every part of the cemetery is to be inclosed by walls or other sufficient fences of the prescribed materials and dimensions; and if no materials or dimensions be prescribed, by substantial walls or iron railings of the height of eight feet at least.

Sect. 16.
Cemetery &c. to be kept in repair.

The company are to keep the cemetery and the buildings and fences thereof in complete repair, and good order and condition, out of the monies to be received by them.

Sect. 17.
Company to make compensation for damages done.

Provided, that in the exercise of the powers granted to the company they do as little damage as can be, and make full compensation to all parties interested for all damage sustained by them through the exercise of such powers.

PREVENTION OF NUISANCES.

Sect. 18.
Power to make sewers, drains, &c. in and

With respect to preventing nuisance from the cemetery, ss. 18—22 enact that the company are to make all necessary and proper sewers and drains in and about the cemetery, for draining and keeping the same dry, and they may from time to time, as occasion requires, cause any such sewer or drain to open

(1) *Prescribed*:—This word, used in the act in reference to any matter therein stated, must be construed to refer to such matter as the same shall be prescribed or provided for in the special act; and the sentence in

which the word occurs, must be construed as if instead of the word "prescribed," the expression "prescribed for that purpose in the special act" had been used.

into any existing sewer, with the consent in writing of the persons having the management of such sewer, and with the consent in writing of the persons having the management of the street or road, and of the owners and occupiers of the lands through which such opening is made, doing as little damage as possible to the road or ground wherein such sewer or drain may be made, and restoring it to the same or as good condition as it was in before being disturbed.

VAULTS AND CEMETERIES.
about the cemetery.

When any street or road or sewer shall be opened, with such consent as aforesaid, the clauses of the Waterworks Clauses Act, 1847, with respect to breaking up streets, for the purpose of laying pipes, so far as the same are consistent with the act and applicable thereto, are to be incorporated with the act, and to apply to the company, and to any ground broken by them for making any such sewer or drain to open into any existing sewer.

Sect. 19.
Certain provisions of Waterworks Clauses Act, 1847, incorporated with the act.

If the company cause or suffer to be brought or to flow into any stream, canal, reservoir, aqueduct, pond, or watering place, any offensive matter from the cemetery, whereby the water therein be fouled, they will forfeit for every such offence the sum of 50*l.*; and the penalty, with full costs of suit, may be recovered by any person having right to use the water fouled by such offensive matter, in any of the superior courts, by action of debt or on the case: provided that the penalty be not recoverable unless the same be sued for during the continuance of the offence, or within six months after it has ceased.

Sect. 20.
Penalty for allowing water to be fouled.

In addition to which penalty of 50*l.* (and whether such penalty is recovered or not), any person having right to use the water fouled by such offensive matter may sue the company in an action on the case in any court of competent jurisdiction for any damage specially sustained by him by reason of the water being so fouled; or if no special damage be alleged, for the sum of 10*l.* for each day during which such offensive matter is brought or flows after the expiration of twenty-four hours from the time when notice of the offence is served on the company by such person.

Sect. 21.
Penalty to be sued for within six months.

Sect. 22.
In addition to penalty of 50*l.* a daily penalty during the continuance of the offence.

With respect to burials in the cemetery, the bishop of the diocese in which the cemetery is situated, may, on the application of the company, consecrate any portion of the cemetery set apart for the burial of the dead according to the rites of the Established Church, if he be satisfied with the title of the company to such portion, and think fit to consecrate such portion; and that the part which is so consecrated shall be used only for burials according to the rites of the Established Church: but the company must define by suitable marks the consecrated and unconsecrated portions of the cemetery.

BURIALS.
Ss. 23—30.
Sect. 23.
Portion of cemetery to be set apart for members of Established Church.

The company are also to build, within the consecrated part of the cemetery, and according to a plan approved of by the bishop of the diocese, a chapel for the performance of the burial service according to the rites of the Established Church; and no body buried in the consecrated part of the cemetery is to be removed from its place of burial without the like authority as is by law required for the removal of any body buried in the churchyard belonging to a parish church.

Sect. 24.
Consecrated ground to be defined.
Sect. 25.
A chapel in connection with the Established Church to be constructed.

The company are from time to time, with the approval of the bishop of the diocese in which the cemetery is situated, to appoint a clerk in holy orders, of the Established Church to officiate as chaplain in the consecrated part of the cemetery; and such chaplain is to be licensed by and be subject

Sects. 26 & 27.
Bodies not to be removed.
Appointment of chaplain.

VAULTS AND CEMETERIES.

Sect. 28.
Chaplain to perform burial service when required.

to the jurisdiction of the bishop, who is empowered to revoke any such licence, and to remove such chaplain, for any cause which appears to him reasonable.

Sect. 29.
Other clergymen of the Established Church may be allowed to officiate.

The chaplain must, when required, unless prevented by sickness or other reasonable cause, perform the burial service over all bodies brought to be buried in the consecrated part of the cemetery, which are entitled to be buried in consecrated ground according to the rites and usage of the Established Church.

Sect. 30.
Company to pay the chaplain a stipend approved by the bishop.

Any clerk in holy orders of the Established Church, not being prohibited by the bishop, or under ecclesiastical censure, may, at the request of the executor of the will of any deceased person, or any other person having the charge of the burial of the body of any deceased person, and with the consent of the chaplain for the time being of the cemetery, or if there be no chaplain, with the consent of the bishop, perform the burial service over such body in the consecrated part of the cemetery.

The company are, out of the monies received by them, to allow to the chaplain of the cemetery for the time being such a stipend as is approved of by the bishop of the diocese in which the cemetery is situated, which is to be payable, by equal moieties, on the 25th day of March and the 29th day of September in each year; and if any chaplain die, resign, or be removed or appointed, in the interval between the half-yearly days of payment, the company are to pay to him, or his executors or administrators, a part only of the half-yearly payment of the stipend proportioned to the time during which he shall have been the chaplain since the last preceding day of payment.

Sect. 31.
Stipend to be recovered by action at law.

If the stipend of the chaplain, or any part thereof, be not paid to the chaplain entitled to receive the same, or to the executors or administrators of a deceased chaplain, for the space of thirty days next after any of the days of payment whereon the same ought to be paid, such chaplain, or his executors or administrators, may recover the same, with full costs of suit, against the company, by action of debt or upon the case in any court of competent jurisdiction.

Sect. 32.
Burials in the consecrated portion to be registered by the chaplain.

All burials in the consecrated part of the cemetery are to be registered in register books to be provided by the company, and kept for that purpose by the chaplain, according to the laws in force by which registers are required to be kept by the rectors, vicars, or curates of parishes or ecclesiastical districts in England; and such register books, or copies or extracts therefrom, are to be received in all courts in evidence of such burials; and copies or transcripts thereof are from time to time to be sent to the registrar of the Ecclesiastical Court of the bishop of the diocese in which the cemetery is situated, to be kept with the copies of the other register books of the parishes within his diocese.

Sect. 33.
Registers to be subject to the regulations of stat. 6 & 7 Gul. 4. c. 86. as to searches, &c.

The register books, so far as respects searches to be made therein, and copies and extracts to be taken therefrom, are to be subject to the same regulations as are provided by stat. 6 & 7 Gul. 4. c. 86., so far as such regulations relate to register books of burials kept by any rector, vicar, or curate.

Sect. 34.
Clerk appointed for the consecrated

The company may, with the consent of the chaplain for the time being, from time to time appoint a clerk to assist in performing the service for burials in the consecrated part of the cemetery, and allow to such clerk

such stipend as they think proper out of the monies to be received by them, and may remove such clerk at their pleasure.

The company may set apart the whole or a portion of that part of the cemetery which is not set apart for burials according to the rites of the Established Church, as a place of burial for the bodies of persons not being members of the Established Church, and may allow such bodies to be buried therein, under such regulations as the company appoint.

The company may allow, in any chapel built within the unconsecrated part of the cemetery, a burial service to be performed according to the rites of any church or congregation other than the Established Church, by any minister of such other church or congregation duly authorised by law to officiate in such church or congregation, or recognised as such by the religious community or society to which he belongs.

The company may appoint grave-diggers and other servants necessary for the care and use of the cemetery, and may pay them such wages and allowances as they think fit out of the monies to be received by them, and may remove them or any of them at their pleasure.

The company are to make regulations for ensuring that all burials within the cemetery are conducted in a decent and solemn manner.

No body is to be buried in any vault under any chapel of the cemetery, or within fifteen feet of the outer wall of any such chapel.

With respect to exclusive rights of burial, and monumental inscriptions in the cemetery, the company may set apart such parts of the cemetery as they think fit for the purpose of granting exclusive rights of burial therein, and they may sell, either in perpetuity or for a limited time, and subject to such conditions as they think fit, the exclusive right of burial in any parts of the cemetery so set apart, or the right of one or more burials therein; and they may sell the right of placing any monument or gravestone in the cemetery, or any tablet or monumental inscription on the walls of any chapel or other building within the cemetery.

The company are to cause a plan of the cemetery to be made upon a scale sufficiently large to show the situation of every burial place in all the parts of the cemetery so set apart, and in which an exclusive right of burial has been granted; and all such burial places are to be numbered, and such numbers entered in a book to be kept for that purpose, and such book is to contain the names and descriptions of the several persons to whom the exclusive right of burial in any such place of burial has been granted by the company; and no place of burial, with exclusive right of burial therein, is to be made in the cemetery without the same being marked out in such plan, and a corresponding entry made in the book, and the plan and book must be kept by the clerk of the company.

The grant of the exclusive right of burial in any part of the cemetery, either in perpetuity or for a limited time, and of the right of one or more burials therein, or of placing therein any monument, tablet, or gravestone, may be made in the form in the schedule to the act annexed (1), or to the

VAULTS AND CEMETERIES.

part of the cemetery.

Sect. 35. As to burial of persons not members of the Church of England.

Sect. 36. Company may allow any burial service to be performed in dissenting chapels.

Sect. 37. Power to appoint grave-diggers, &c.

Sect. 38. Regulations for ensuring decency and solemnity.

Sect. 39. No burials under or close to chapels.

EXCLUSIVE RIGHTS OF BURIAL. Ss. 40—51.

Sect. 40. Parts of the cemetery may be set apart for exclusive burial.

Monumental inscriptions.

Sect. 41. Plan and book of reference to be kept, and be open to inspection.

Sect. 42. Form of grant of right of burial.

(1) *Form of grant of right of burial.*

By virtue of [here name the special act] we [here state the name or description of the company], in consideration of the sum of —

to us paid by — of — do hereby grant unto the said — the exclusive right of burial [or the right of burying — bodies, as the case may be,] [or the right of placing

VAULTS AND
CEMETERIES.

Sect. 43.
Register of
grants to be
kept.

like effect, and where the company are not incorporated it may be executed by the company or any two or more of them.

A register of all such grants is to be kept by the clerk to the company, and within fourteen days after the date of any such grant an entry or memorial of the date thereof and of the parties thereto, and also of the consideration for such grant, and also a proper description of the ground described in such grant, so as the situation thereof may be ascertained, is to be made by the clerk in such register; and such clerk will be entitled to demand such sum as the company think fit, not exceeding the prescribed sum, or if no sum be prescribed, 2s. 6d., for every such entry or memorial; and the register may be perused at all reasonable times by any grantee or assignee of any right conveyed in any such grant, upon payment of the prescribed sum, or if no sum be prescribed, 1s., to the clerk of the company.

Sect. 44.
Rights of
burial, &c. to
be assignable,
or may be be-
queathed by
will.

The exclusive right of burial in any such place of burial, whether granted in perpetuity or for a limited time, is to be considered as the personal estate of the grantee, and may be assigned in his lifetime or bequeathed by his will.

Sect. 45.
Form of assign-
ment.

But every such assignment made in the lifetime of the assignor must be by deed duly stamped, in which the consideration shall be duly set forth, and may be in the form in the schedule to the act annexed (1), or to the like effect.

Sect. 46.
Assignments
to be regis-
tered.

And every such assignment must, within six months (2), after the execution thereof, if executed in Great Britain or Ireland, or within six months after the arrival thereof in Great Britain or Ireland, if executed elsewhere, be produced to the clerk of the company, and an entry or memorial of such assignment must be made in the register by the clerk of the company, in the same manner as that of the original grant; and until such entry or memorial no right of burial will be acquired under any such memorial; and for every such entry or memorial the clerk will be entitled to demand such sum as the company think fit, not exceeding the prescribed sum, or if no sum be prescribed, 2s. 6d.

Sect. 47.
Probates of
wills to be
registered.

An entry or memorial of the probate of every will by which the exclusive right of burial within the cemetery is bequeathed, and in case it contain any specific disposition of such exclusive right of burial, an entry of such

a monument, tablet, or gravestone,] in [here describe the ground intended for the exclusive burial, or for placing a monument, tablet, or gravestone, as the case may be, so as to identify the same, and if a place of exclusive burial, add, "numbered — on the plan of the cemetery, made in pursuance of the said act"], to hold the same to the said — in perpetuity [or the period agreed upon] for the purpose of burial [or as the case may be].

(Given under our common seal [or under our hands and seals, as the case may be,] this — day of — in the year of our Lord —.

(1) *Form of assignment of right of burial.*

I A. B. of —, in consideration of the sum of — paid to me by C. D. of —, do hereby assign unto the said C. D. the exclusive right of burial in [here describe the

place], and numbered — on the plan of the cemetery made in pursuance of the said act, which was granted to me [or unto A. B. of —] in perpetuity [or as the case may be] by [here state the name of the company] by a deed of grant bearing date the — day of —, and all my estate, title, and interest therein, to hold the same unto the said C. D. in perpetuity [or, as the case may be, for the remainder of the period for which the same was granted by the said company], subject to the conditions on which I held the same immediately before the execution hereof.

Witness my hand and seal this — day of —.

(2) *Months:* — The word "month," in this or the special act, must be construed calendar month.

disposition, is, within six months after the probate of such will, to be made in the register, in the same manner as that of the original grant; and until such entry no right of exclusive burial will be acquired under such will; and for every such entry or memorial the clerk of the company will be entitled to demand such sum as the company think fit, not exceeding the prescribed sum, or if no sum be prescribed, 2s. 6d.

No body can be buried in any place wherein the exclusive right of burial shall have been granted by the company, except with the consent of the owner for the time being of such exclusive right of burial.

But no such grant is to give the right to bury within the consecrated part of the cemetery the body of any person not entitled to be buried in consecrated ground according to the rites and usage of the Established Church, or to place any monument, gravestone, tablet, or monumental inscription respecting any such body within the consecrated part of the cemetery.

The company may take down and remove any gravestone, monument, tablet, or monumental inscription which shall have been placed within the cemetery without their authority.

The bishop of the diocese in which the cemetery is situated, and all persons acting under his authority, have the same right and power to object to the placing, and to procure the removal of any monumental inscription within the consecrated part of the cemetery as he by law has to object to or procure the removal of any monumental inscription in any church or chapel of the Established Church, or the burial ground belonging to such church or chapel, or any other consecrated ground.

With respect to payments to incumbents of parishes or ecclesiastical districts and to parish clerks, the company, on the burial of every body within the consecrated part of the cemetery, must pay to the incumbent for the time being of the parish or ecclesiastical district from which such body shall have been removed for burial, such sums, if any, as shall be prescribed for that purpose in the special act.

And for ascertaining the amount of the payments, if any, to be made to the incumbents of the several parishes or districts, the company are to cause books to be kept, and entries to be made therein of the names of all persons whose bodies are buried within the consecrated part of the cemetery, and the names of the parishes or districts from which such bodies respectively have been removed, and the manner of their burial within the cemetery (distinguishing whether in a place of exclusive burial or otherwise), with the date of such burial; and such books are to be at all reasonable times open to the inspection of the incumbents for the time being of the several parishes or districts, or any person employed by them, without fee or reward.

The company are, on every 25th day of March and 29th day of September, or within one month after each of those days, to deliver to the person who is the incumbent of any parish or ecclesiastical district on that day, or to his executors or administrators, on demand made within the month, an account of the sums, if any, payable in respect of bodies removed for burial within the consecrated part of the cemetery from such parish or ecclesiastical district during the half year next preceding such 25th day of March, or 29th day of September, as the case may be.

VAULTS AND CEMETERIES.

Sect. 48.
Vaults to be kept exclusively for purchasers of exclusive right.

Sect. 49.
No such grant to give the right of burial in consecrated ground to certain persons.

Sect. 50.
Power to remove monuments improperly erected.

Sect. 51.
Bishop to have power to object to monumental inscriptions in consecrated part of cemetery.

PAYMENTS TO INCUMBENTS OF PARISHES.

Ss. 52—57.

Sect. 52.
Payments to incumbents of parishes from which bodies are brought.

Sect. 53.
Company to keep an account of interments.

Sect. 54.
Account of payments due to incumbents of parishes to be rendered half-yearly.

VAULTS AND CEMETERIES.

Sect. 55.
Fees to be paid to incumbents of parishes half-yearly.

The sums payable by virtue of the special act are to be paid half-yearly on the 25th day of March and the 29th day of September, or within one month afterwards, to the persons who are the incumbents of the parishes or ecclesiastical districts in respect of which the same are payable on such 25th day of March and 29th day of September respectively, or the executors or administrators of such incumbents; (that is to say), such sums as accrue between the 29th day of September and the 25th day of March following are to be paid to the person who is the incumbent on the 25th day of March, and such sums as accrue between the 25th day of March and the 29th day of September following are to be paid to the person who is the incumbent on the 29th day of September; and if any such sums be not paid to the party entitled to receive the same within the period limited for the payment thereof, such party may recover the same, with full costs, by action of debt or on the case, in any court having competent jurisdiction.

Sect. 56.
Payment to be made to the incumbent for the time being, who is to account with his predecessor.

If any incumbent of any parish or district in respect of which sums are payable by the company by virtue of the special act, ceases to be incumbent, by cession, death, or otherwise, between the two half-yearly days of payment, he will be entitled to receive so much of the sum payable at the half-yearly day next after he ceases to be incumbent as has accrued from the last preceding half-yearly day, or from the time when such incumbent became first entitled to receive the fruits of his living, as the case may require, up to the day on which he ceased to be incumbent; and the incumbent of any parish or district who receives from the company any sum to a part of which any preceding incumbent is entitled under the provisions of the act, is to pay such part to him, his executors or administrators, accordingly; and the company are not to be answerable to any person, other than the actual incumbent for the time being, for the payment of any sums by virtue of this or the special act.

Sect. 57.
Company to pay parish clerks the compensation mentioned.

The company are, on the burial of every body within the consecrated part of the cemetery, except where the body is buried at the expense of any parish or ecclesiastical district, or union of parishes for the relief of the poor, to pay to the parish clerk of the parish or ecclesiastical district from which such body has been removed for burial, if he held the office of parish clerk of such parish or ecclesiastical district at the time of the passing of the special act, but not otherwise, such sum, if any, as shall be prescribed for that purpose in the special act.

PROTECTION OF CEMETERY.

Ss. 58, 59.

Sect. 58.
Penalty for damaging the cemetery.

With respect to the protection of the cemetery — every person wilfully destroying or injuring any building, wall, or fence belonging to the cemetery, or any tree or plant therein, or daubing or disfiguring any wall thereof, or putting up any bill therein or on any wall thereof, or wilfully destroying, injuring, or defacing any monument, tablet, inscription, or gravestone within the cemetery, or doing any other wilful damage therein, will forfeit to the company for every such offence a sum not exceeding 5*l*.

Sect. 59.
Penalty on persons committing nuisances in the cemetery.

Every person playing at any game or sport, or discharging fire-arms, save at a military funeral, in the cemetery, or wilfully and unlawfully disturbing any persons assembled in the cemetery for a burial, or committing any nuisance within the cemetery, will forfeit to the company for every such offence a sum not exceeding 5*l*.

Accounts.
Sect. 60.
Annual --

With respect to the accounts to be kept by the company, s. 60. enacts, that the company shall every year cause an account to be prepared, show-

ing the total receipt and expenditure of all monies levied by virtue of this or the special act for the year ending on the 31st day of December, or some other convenient day in each year, under the several distinct heads of receipt and expenditure, with a statement of the balance of such account, certified by the chairman of the company, and duly audited, and shall send a copy of the account, free of charge, to the clerk of the peace for the county in which the cemetery is situated, on or before the expiration of one month from the day on which such account ends; and the account is to be open to the inspection of the public at all reasonable hours on payment of the sum of 1s. for every such inspection; and if the company omit to prepare or send such account, they will forfeit for every such omission the sum of 20l.

VAULTS AND CEMETERIES.

count to be made up, and a copy transmitted to the clerk of the peace, &c., and to be open to inspection.

With respect to the tender of amends, s. 61. enacts, that if any person have committed any irregularity, trespass, or other wrongful proceeding in the execution of this or the special act, or any act incorporated therewith, or of any power or authority thereby given, and if, before action brought in respect thereof, he make tender of sufficient amends to the party injured, such party cannot recover in any such action; and if no such tender have been made, the defendant, by leave of the Court where such action is pending, may at any time before issue joined pay into court such sum of money as he thinks fit, and thereupon such proceedings are to be had as in other cases where defendants are allowed to pay money into court.

Sect. 61.
Tender of amends.

With respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, — the clauses of the Railways Clauses Consolidation Act, 1845, with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, are incorporated with this and the special act, and are to apply to the cemetery and to the company respectively.

RECOVERY OF DAMAGES AND PENALTIES.

Ss. 62—64.

Sect. 62.
Stat. 8 & 9
Vict. c. 20. incorporated as to damages, &c.

Provided, that in Ireland, in the case of any penalty imposed by justices, where the application is not otherwise provided for, such justices may award not more than one half of such penalty to the informer, and shall award the remainder to the guardians of the poor of the union within which the offence shall have been committed, to be applied in aid of the poor rates of such union.

Sect. 63.
In Ireland, part of penalty to be paid to guardians of unions.

And all things in this or the special act, or any act incorporated therewith, authorised or required to be done by two justices, may and are to be done by any one magistrate having by law authority to act alone for any purpose with the powers of two or more justices.

Sect. 64.
When justices may act singly.

Every person who upon any examination upon oath, under the provisions of this or the special act, or any act incorporated therewith, wilfully and corruptly gives false evidence, will be liable to the penalties of wilful and corrupt perjury.

PERJURY.
Sect. 65.

With respect to affording access to the special act, s. 66. provides that the company must, at all times after the expiration of six months after the passing of such act, keep in their principal office of business a copy of the special act, printed by the printers to her Majesty, or some of them, and must also, within the space of such six months, deposit in the office of the clerk of the peace of the county in which the cemetery is situated, a copy of such special act so printed; and the clerk of the peace is to receive, and he and the company respectively are to keep such copies, and allow all per-

ACCESS TO SPECIAL ACT.
Ss. 66 & 67.
Copies of special act to be kept by company at their office, and deposited with the clerk of the peace, and he

**VAULTS AND
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open to inspection.

**Sect. 68.
Company
not exempt
from any future
general act.**

sons interested therein to inspect the same, and make extracts or copies therefrom, in the like manner, and upon the like terms, and under the like penalty for default, as is provided in the case of certain plans and sections by stat. 7 Gul. 4. & 1 Vict. c. 83.

If the company fail to keep or deposit any of the copies of the special act as hereinbefore mentioned, they will forfeit 20*l.* for every such offence, and also 5*l.* for every day afterwards during which such copy shall not be so kept or deposited.

And nothing in this act is to be deemed to exempt the company from any general act relating to burials in towns or populous places which may be passed in the same session of parliament in which the special act is passed, or in any future session of parliament.

VESTRIES. (1)

1. GENERALLY, pp. 1325—1334.

Defined — Where held — By whom summoned — Notice of meetings — Who can attend meetings — The minister has a right to preside at vestry meetings — Authority of the chairman — Powers of adjournment — Judgment of Lord Denman in *REX v. CHESTER (ARCHDEACON OF)* *— Judgment of Sir Herbert Jenner Fust in* *BAKER v. WOOD* *— Time requisite for the duration of the poll — POWER OF VESTRIES — Control in parish matters — Succeeding vestry superseding the acts of preceding vestry — Distribution of pews — Liabilities of vestrymen — Signing the minutes — VESTRY CLERK — Custody of the books — Duration of office — THE BEADLE.*

2. SELECT VESTRIES BY CUSTOM, pp. 1334—1338.

Prescription and constant immemorial usage, the basis of a select vestry by custom — Customs where triable — Customs — Must be continuous, acquiesced in, reasonable, compulsory, and consistent — Judgment of Lord Tenterden in *GOLDING v. FENN.*

3. PROVISIONS OF STAT. 58 GEO. 3. c. 69., STAT. 59 GEO. 3. c. 85., AND STAT. 59 GEO. 3. c. 12., pp. 1339—1348.

Stat. 58 Geo. 3. c. 69. — Three days' notice to be given of vestries by publication in the church and affixing on the church door — Chairman of vestries appointed — Chairman to have the casting vote — Minutes to be entered and signed — MANNER OF VOTING IN VESTRIES — Electors cannot abridge the time of voting — The common law mode of election — Illegal to close the doors of a vestry especially during a poll — Judgment of Lord Denman in *REGINA v. LAMBETH (RECTOR OF)* *— Judgment of Chief Justice Abbott in* *NIGHTINGALE v. MARSHALL* *— General electoral rights of rate-payers under a local act — Judgment of Lord Denman in* *REGINA v. D'OYLY AND REG. v. HEUGER* *— Inhabitants coming into a parish since the last rate may vote — Inhabitants refusing payment of rates to be excluded from vestries — Preservation of parish books and papers — Penalty for retaining or injuring parish books, &c. — Recovery and application of penalty — Not to affect other proceedings — Provisions in relation to parishes extended to townships, &c. — Manner of giving notices of vestries and meetings in special cases — Not to alter the time for holding vestries specially directed — Nor to affect special vestries — STAT. 59 GEO. 3. c. 85. — Persons rated to the poor though not parishioners, may vote in vestry according to the value of the premises rated — Clerk or agent of corporation, &c., may vote in vestry according to the value of the premises rated — Non-payment of rates to disqualify from being present or voting in vestry — STAT. 59 GEO. 3. c. 12. — When a select vestry cannot elect another select vestry.*

(1) *Vide ante*, tit. CHURCH — CHURCHWARDENS — MANDAMUS — PROHIBITION.

4. PARTICULAR SELECT VESTRIES BY STATUTE, pp. 1348—1352.

STAT. 10 ANNE, c. 11. — VESTRIES UNDER CHURCH BUILDING ACTS — Stat. 59 Geo. 3. c. 134. s. 30. — Stat. 3 Geo. 4. c. 72. s. 10. — *A select vestry, appointed under stat. 59 Geo. 3. c. 134. s. 30., has no power to impose a rate for the repair of the district church — Judgment of Lord Tenterden in COCKBURN v. HARVEY — Appointment of new vestrymen where vestrymen neglect to attend — Where a vestry will not be compelled to appoint a surveyor to certify the proper construction, draining, &c. of a new road. — Judgment of Lord Tenterden in REX v. PADDINGTON (VESTRY OF).*

5. VESTRIES UNDER STAT. 1 & 2 GUL. 4. c. 60., pp. 1352—1368.

Act may be adopted by any parish — Manner of adopting it in parishes where inhabitants do not assemble in open vestry — Form of requisition — Upon receipt of requisition churchwardens to give notice of time and place for receiving votes — Form of notice — Form of declaration — Churchwardens to declare whether the votes are in favour of adopting the act — Rate-payers may inspect votes — No person to vote unless he has been rated one year — Notice of adoption of the act — No similar requisition to be made within three years — The act to take effect in all parishes in which its adoption has been notified — Penalties on churchwardens and others refusing to call meetings, &c. — Notices of election to be given — Rate collectors, &c. may be summoned to assist at the election — Form of proceeding at annual elections — Nomination of inspectors of votes — Decision of the chairman on a show of hands that one or the other party has a majority is not conclusive — Existence of party feeling in the chairman — Where an election has been irregularly conducted — Judgment of Lord Denman in REG. v. ST. PANCRA'S (VESTRYMEN OF) — Ballot may be demanded — Mode of voting — Duty of inspectors — In case of equality of votes — Penalty for forging or falsifying any voting list, or obstructing the election — Public notice to be given of vestrymen and auditors chosen by parishioners — Penalty on inspectors for making incorrect returns — Elections to be annual — Vestry to consist of not less than 12, nor more than 120 householders — Proportion of existing vestry to go out of office at each of first three elections under the act — Judgment of Mr. Justice Parke in REX v. ST. PANCRA'S, MIDDLESEX (CHURCHWARDENS OF) — Vestrymen to quit office after three years, and one third of the whole number to be elected annually — Qualifications of vestrymen — Vestries appointed after the adoption of the act to exercise the authority of former vestries — Not to affect local acts regarding vestries, divine worship, &c., except as therein expressed — The acts of a quorum of the vestry at any meeting to be considered as the acts of the vestry — Meetings not to be held in the church — Meeting to elect a chairman — Proceedings to be entered in books, to be open to inspection — Account books to be kept, and be open to inspection — Auditors to be chosen annually — Qualification — Further qualifications of auditors — Disqualifications — Mode of audit — Judgment of Lord Denman in REX v. ST. PANCRA'S CHURCH (TRUSTEES OF) — Auditors may call for persons and books — Accounts to be signed by auditors — Accounts after audit, to be open to inspection — Abstracts of accounts to be published fourteen days after being audited — Vestry to make out and publish yearly a list of estates, charities, and bequests, &c. with the application thereof — Saving of ecclesiastical jurisdiction — Meaning of terms used in the act — As to affixing notices — Act not to extend to parishes, where not more than 800 rate-payers, except in cities or towns.

1 GENERALLY. (1)

GENERALLY.

A vestry, properly speaking, is the assembly of the whole parish, met together in some convenient place for the despatch of the affairs and business

Defined.

(1) The following is a tabular statement of the principal statutes relative to vestries :—

For the regulation of vestries	-	-	58 Geo. 3. c. 69.	} E.
Amended by	-	-	{ 59 Geo. 3. c. 85.	
Vide etiam	-	-	{ 7 Gul. 4. & 1 Vict. c. 45.	
Establishing select vestries	-	-	4 & 5 Gul. 4. c. 76.	} E.
Repealed in part, and other provisions made, by	-	-	59 Geo. 3. c. 12.	
	-	-	4 & 5 Gul. 4. c. 76.	
For the better regulation of vestries in certain parishes	-	-	{ 1 & 2 Gul. 4. c. 60.	} E.
Vide etiam	-	-	{ 4 & 5 Gul. 4. c. 76.	
Altering the mode of giving notices for holding vestries	-	-	{ 7 Gul. 4. & 1 Vict. c. 45.	
For the regulation of vestries in Ireland	-	-	7 Geo. 4. c. 72.	} I.
Vide etiam	-	-	3 & 4 Gul. 4. c. 37. s. 65.	

GENERALLY.

of the parish; and this meeting being commonly held in the vestry adjoining or belonging to the church, it thence takes the name of vestry, as the place itself does from the priest's vestments, which are usually deposited and kept there. (1)

Where held.

It is not essential to the validity of the meeting that it should be held in the vestry of the church, and it may be convened in the church itself; but, if it be held in either of those places the Ecclesiastical Court has jurisdiction, *ratione loci* (2), over any misconduct or disorder committed therein (3), though more license is permitted in the vestry room, than would be considered excusable in the church, as the vestry is the place for parish business; and the Court would not interpose in such case, further than might be necessary for the preservation of due order and decorum. (4)

It has been held, that the town hall is not an improper place to take the poll, by reason of its being private property, where no person had been prevented from voting on that account. (5)

By whom summoned.

In *Dawe v. Williams* (6) Sir John Nicholl observed, "Vestries for church matters regularly are to be called by the churchwardens, with the consent of the minister. The late act of parliament (7) neither altered the general authority under which, nor the persons by whom, vestries are to be called; it only added some further formalities in the mode of calling, such as, directing the notice to be put on the church-door, and that it shall be given a certain number of days before the vestry is to meet."

NOTICE OF MEETINGS.

These meetings are usually assembled according to the exigencies of the parish. In *Clutton v. Cherry* (8) Sir John Nicholl said, "I am yet to learn, and I have called upon the counsel for authority on this point, and they have not brought it, and it goes to the very foundation of their case, that notice must be given of the specific purpose for which a vestry is to be called; it may be fit and proper, if anything peculiar is to be done, and the parish are to be involved in expenditure, that the specific purpose should be stated—it may be highly proper,—but a distinction is to be taken between what is highly proper, and strictly legal;" but it is provided by stat. 58 Geo. 3. c. 69. s. 11., that what was formerly adjudged fit and proper to be done in this respect, shall be observed and performed.

Anciently notice was given publicly on the Sunday before every vestry meeting, either in the church after divine service was ended, or else at the church door as the parishioners came out.

But although proclamation during divine service for the meeting of a vestry, or of the purport of such meeting, was proper, it was indecorous to announce the result of a meeting in the same way.

Stat. 58 Geo. 3. c. 69. s. 1.**Three days no-**

Bystat. 58 Geo. 3. c. 69. s. 1. "no vestry or meeting of the inhabitants (9), in vestry of or for any parish, shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same

(1) Shaw's P. L. 48. 1 Burn's E. L. 415. (c).

(2) *Wenmouth v. Collins*, 2 Ld. Raym. 850.

(3) *Wilson v. M. Muth*, 3 B. & A. 241.

(4) *Hutchins v. Denziloe*, 1 Consist. 185.

(5) *Baker v. Wood*, 1 Curt. 527.

(6) 2 Aid. 138.

(7) Stat. 58 Geo. 3. c. 69.

(8) 2 Phil. 384.

(9) It was formerly usual for one of the church bells to be tolled for half an hour before the meeting commenced, to give the parishioners notice for their assembling together. Shaw's P. L. 48.

and the special purpose thereof, three days at the least before the day to be appointed for holding such vestry, by the publication of such notice, in the parish church or chapel, on some Sunday during or immediately after divine service; and by affixing the same, fairly written or printed, on the principal door of such church or chapel."

By stat. 7 Gul. 4. & 1 Vict. c. 45. s. 1. "no proclamation or other public notice for a vestry meeting, or any other matter, shall be made or given in a church or chapel, during or after divine service, or at the door of any church or chapel, at the conclusion of divine service; and by sect. 2. all proclamations and notices which by law or custom have heretofore been made or given in churches during or after divine service, are to be reduced into writing, and written or printed copies are to be affixed on or near to the doors of all the churches or chapels within the parish or place, previously to the commencement of divine service, on the several days on which such proclamations or notices have heretofore been made or given in the church or at the door thereof."

Where an act of parliament for regulating the concerns of the poor in a particular parish, required that a certain notice should be given of a vestry for the election of a treasurer, and that a treasurer should be elected at vestry held in pursuance of such notice, it was held, that to support allegation in an indictment that "A. was duly elected treasurer of the said parish," an entry in the vestry book, stating that A. was elected treasurer at a vestry duly held in pursuance of notice, was sufficient evidence (1); Chief Baron McDonald observing, "Strict evidence of the appointment does seem requisite, and to the validity of the appointment due notice of holding the vestry is essential; but I conceive that this is fully proved by the recital in the vestry book. What is thus recorded before the inhabitants of the parish, I must consider as having their assent, and as being evidence in any case of this description." (2)

Anciently, at the common law, every parishioner who paid to the church rates, or scot and lot, and no other person, had a right to come to these meetings. (3) But this must not be misunderstood of the minister, who has a special duty incumbent on him in this matter, and must be responsible to the bishop for his care therein; and therefore in every parish meeting he presides for the regulating and directing of the affair; and this equally holds, whether he be rector or vicar.

Residence within the parish is not a necessary qualification, as all out-dwellers occupying land in the parish have a vote in the vestry, as well as the inhabitants.

Nor is the payment of church rates essential to entitle a person to vote at vestry meetings. And although at a meeting of the parishioners, in whom, by the custom, the right of electing to a perpetual curacy was vested, such meeting being duly convened for the purpose of choosing a fit person to fill the perpetual curacy, it was resolved, before the election began, that parishioners who had not paid (not having been assessed to) church rates, should not be allowed to vote, and in consequence several persons, legally

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Notice to be given of vestries by publication in the church, and affixing on the church door.

Stat. 7 Gul. 4 & 1 Vict. c.45.

Notices for vestry meetings are to be given.

Who can attend vestry meetings.

(1) *Rex v. Martin*, 2 Camp. 100.

(3) *Shaw's P. L.* 49. 17.

(2) Vide etiam *Thomas v. Morris*, 1 Add. 470.

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qualified to vote, did not tender their votes; and the votes of others were rejected, because they had not paid the church rate, though they had paid poor rates;—it was held by the Court of King's Bench, that the election was not according to the custom; and that it was not competent to the parishioners assembled to narrow the custom by passing a by-law, which would have the effect of making it depend upon the will of particular persons whether a person had a right to vote or not, by inserting, or omitting to insert, the names of any particular parishioners in the church rate, and demanding payment thereof. (1)

Although inhabitancy is not requisite to confer electoral rights, yet rateability is necessary; and payment of the rates if demanded is equally requisite. (2)

The minister has a right to preside at vestry meetings.

The minister has a right to preside at all vestry meetings; for a minister is not a mere individual of vestry; on the contrary, he is always described as the first, and as an integral part of the parish; the form of citing a parish being, "the minister, churchwardens, and parishioners;" and putting any other individual in competition with him for the office of chairman, would be placing him in a degraded situation, in which he is not placed by the constitutional establishment of this country. He is the head and presides of the meeting. (3) Thus it has been held, that at a vestry meeting summoned by the churchwardens for the purpose of electing new churchwardens in a parish regulated by stat. 58 Geo 3. c. 69., the rector has a right to preside. (4) But the minister is not an integral part of the vestry. (5)

Stat. 58 Geo. 3. c. 69. s. 2. directs that if the rector or vicar, or perpetual curate, be not present, the persons assembled must forthwith nominate by plurality of votes, to be ascertained as therein directed, one of the inhabitants to be chairman, which is nearly tantamount to a declaration, or by necessary implication declares, that if the rector, vicar, or curate be present, he shall preside; and the legislature must evidently have considered that by law and usage he was entitled to preside. (6)

Authority of the chairman.

The chairman, by virtue of his office, possesses authority to regulate the whole proceedings of the meeting, to grant a poll, to adjourn it if indispensably necessary, and to do all other necessary acts for transacting the business of the vestry; and he is only amenable for the propriety of his conduct to a court of justice. (7)

Powers of adjournment.

In *Rex v. Chester (Archdeacon of)* (8) notice had been given that a vestry would be held in the church, and that if a poll were demanded it would be adjourned to the town hall; and accordingly, on a poll being demanded, the chairman, without taking the sense of the meeting, adjourned to the town hall:—It was held that the proceeding was regular, no business having been interrupted by it; Lord Denman observing, "The objection has been distinctly and plausibly put. But those who summon a meeting of this kind must necessarily lay down some order for the proceedings; and

Judgment of Lord Denman in *Rex v. Chester (Archdeacon of)*.

(1) *Faulkner (Clerk) v. Elger*, 4 B. & C. 449.

(2) Stat. 58 Geo. 3. c. 69. s. 5.

(3) *Wilson v. M'Math*, 3 Phil. 87. 3 B. & A. 246. n.

(4) *Rog. D'Oyly (D.D.)*, 12 A. & E. 139.

(5) *Mawley v. Barbet*, 2 Esp. N.P.C. 687.

(6) *Vide* stat. 58 Geo. 3. c. 69. s. 2.

(7) *Rog. v. D'Oyly (D.D.)*, 4 P. & D. 52.

(8) 1 A. & E. 342.

I think it is competent to them to say, that the meeting shall be held in one place, and, in a certain event which may require it, shall be removed to another. There is no surprise, or injustice, proved in this case. It is not like *Stoughton v. Reynolds*. (1) There it was held, that the chairman could not adjourn the business of the vestry while it was in progress; but here the business was not in progress at the time of the removal to the town hall. It had been announced that, if there should be a poll, it would be taken in the town hall; and neither the show of hands, nor the poll, was interrupted by the proceeding which took place."

GENERALLY.

Judgment of Lord Denman in *Rex v. Chester* (Arch-deacon of).

In the course of the argument, the Court adverted to a case of *Rex v. St. Mary, Lambeth* (Churchwarden of), T. T. 1832, in which a rule nisi had been obtained for a mandamus to elect churchwardens, &c., on the ground, that on the occasion when the persons then acting were supposed to have been elected, the rector, who was in the chair, had, upon a poll being demanded, adjourned the meeting for that purpose from the school-house (where it was holden by appointment) to the church, of his own authority, and that he had postponed the poll till some other business, which he considered necessary, had been disposed of. The poll was gone into on the same day, and continued on others, at the church. No previous notice had been given of such adjournment. The affidavits were numerous, and went into much detail. The statements in opposition to the rule tended to show that the poll could not have been properly, if at all, taken in the school house, from the nature of the place, and the numbers and tumultuous state of the meeting; and the rule was also opposed on other grounds, independent of the discretionary power of the chairman to adjourn, viz. a former practice of electing at the church, and an alleged acquiescence, on the present occasion, by the parties now complaining. *Stoughton v. Reynolds* (1) was cited in support of the rule, upon which Mr. Justice Parke observed, that in that case the adjournment was to a subsequent day, and asked if the poll could not have been adjourned from one room into another? The Court considering the question too important to be decided without further consideration, and the day on which it was brought on being the last of Trinity term, it was proposed, and agreed by the parties, that the judgment should be given early in the vacation, and the rule drawn up as of the last day of term: and the Court, in the vacation, ordered that the rule should be discharged, but it seems that no reasons were given. (3)

The authorities respecting the adjournment of vestries have been collected by Sir Herbert Jenner Fust, in his judgment in *Baker v. Wood* (4), where that learned judge says, "The first objection is to the adjournment of the poll, which, it is admitted, took place without the opinion of the vestry having been taken upon it; and the case of *Stoughton v. Reynolds* (5) has been relied on, as showing directly, that the power of adjourning a vestry meeting is not in the chairman of the meeting, but in the whole body of the vestry; and it appears from what was said by Lord Hardwicke and the other judges, that the Court of King's Bench was of opinion,

Judgment of Sir Herbert Jenner Fust in *Baker v. Wood*.

(1) 2 Str. 1045.

(2) Ibid.

(3) 1 A. & E. 346. (n).

(4) 1 Curt. 520.

(5) Fortesc. 163. 2 Str. 1045. C. T. II. 274.

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Judgment of
Sir Herbert
Jenner Fust in
Baker v. Wood.

under the circumstances of the case, that the chairman had no such right as he had assumed on that occasion. But in order to see the full effect of that decision, the circumstances of that case must be considered; and it will appear, that they are as far removed from the circumstances of the present case as can be well conceived.

“ I will refer to the case as reported by Fortescue, because it has been stated that Lord Hardwicke's opinion was more strongly expressed in that report than in *Strange* and in the report of cases in the time of Lord Hardwicke.

“ The declaration set forth that the plaintiff, being an inhabitant of the parish of All Souls, Northampton, was chosen churchwarden, and offered himself to Dr. Reynolds, chancellor of the diocese, to be admitted to the office, and the chancellor refused to admit him. Mr. Stoughton thereupon moved for a mandamus to the chancellor to admit him to the office, and the chancellor returned to the mandamus, that he considered the plaintiff was not chosen churchwarden, but another person. The action was brought for a false return, and a special verdict was found to this effect: — That in the parish of All Souls, the vicar has immemorially had the nomination of one of the churchwardens; that the time appointed for choosing churchwardens was a day in Easter week, 1734, when the vicar nominated Mr. Lowlk, and the parishioners the plaintiff; that in the Easter week following, in the year 1735, the vicar chose the same person, and upon a dispute arising, whether the parishioners could choose the plaintiff Stoughton a second time, the vicar adjourned the assembly till the next morning, but that part of the parish who were for the plaintiff staid behind and elected him; and the other party assembling next day, elected another person; and the question was, whether the vicar, who presided, was at liberty, *ex mero motu*, to adjourn the election of churchwardens without any previous notice, or the consent of the meeting, and after the persons present at the meeting had elected a churchwarden, to proceed without notice to elect another churchwarden the next morning?

“ Most undoubtedly, in such circumstances, there is no authority for the power assumed and exercised by the chairman in that case; it was calculated to put an end to the privilege possessed by the parishioners, of electing a person for churchwarden, and to put a stop to all discussion at a meeting called for the purpose of election.

“ In deciding the question in that case, Lord Hardwicke delivered an opinion very strongly; that, even supposing the vicar had a power of presiding (that point has been settled since (1)), it did not follow that he had a power of adjourning the meeting, and that the adjournment was void. And the other judges, Mr. Justice Page and Mr. Justice Lee, delivered the same opinion as Lord Hardwicke. Mr. Justice Lee said, ‘ The parson has a right of sitting from his freehold in the church; but I do not think that can any ways give him a greater right or authority than any of the other members of the assembly; and it is a rule in law, that the major part in all elections have the right of determining for themselves.’ So that the decision in that case comes to this, that the chairman or vicar has no right,

(1) *Wilson v. M. Math*, 3 Phil. 67. 3 B. & A. 244. n. (b).

under the circumstances which have been stated, *ex mero motu*, to adjourn a vestry meeting whilst the business of the vestry meeting is in progress.

“ *Rex v. Winchester (Commissary of the Bishop of)* (1) is an authority for showing (for that is the effect of the case) that where there is no regular presiding officer, the regulation of the meeting devolves on the whole body, and that, in the absence of the vicar, the churchwarden is not entitled to preside. To the extent to which this case goes, it supports the authority of the case of *Stoughton and Reynolds*; that the chairman, as such, has not the power to adjourn the vestry at any time and under any circumstances he may think proper. Another effect of this case the Court will refer to by and by; but one effect of the case is to show, that where there is no regular presiding officer, the adjournment devolves on the meeting, and not on the chairman.

“ Considering the nature of these decisions, and the circumstances of the cases, the question is whether they are applicable to the present, and whether there are not many material distinctions between these cases and that which the Court has under its consideration?

“ Without relying on my own judgment in this particular, it does seem to me that the question has already been decided by the Court of King's Bench, in a case which has been cited in the argument as the *Manchester case* (2), which seems to me to run on all fours with the present case.

“ In the case now before the Court, the notice for calling the vestry in the parish of Dudley, on the 25th of September, was (I believe it has been stated in the argument) copied from the notice in that case, and considering the decision in that case as a precedent for their direction, the churchwardens and vicar of Dudley governed themselves according to that case, and followed its provisions as exactly as the nature of the circumstances would permit; and, in all the subsequent proceedings, conformed with what had been there decided; and the only distinction I find between that case and the present is, that the former was for the election of a churchwarden, whereas the present was for the making of a church rate. But this does not make any real difference between the two cases: the principles which it is proper to follow in respect to making a church rate will be found to be the same as those which apply to the election of churchwardens; and all the conditions in respect to the conduct of the poll, and the course of the proceedings in an election of a churchwarden, are equally applicable to a poll in the question of a church rate.

“ What then were the circumstances of that case? A rule had been obtained, calling on the Archdeacon of Chester to show cause why a mandamus should not issue, calling upon him to swear in certain persons as churchwardens of Manchester, on the grounds that they were duly elected; that the meeting at which their election took place was illegally adjourned, and that a poll subsequently taken was not duly taken.

“ No case can be more clear and direct in its application to the present case than this.”

The question as to the time requisite for the duration of the poll is also much discussed in the course of the same judgment. As seven hundred

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Time requisite
for the dura-

(1) 7 East, 573. (2) *Rex v. Chester (Archdeacon of)*, 1 A. & E. 312. 3 N. & M. 413.

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poll.Judgment of
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and eighty-five persons were the greatest number proved to have voted on any occasion, Sir Herbert Jenner Fust, regretting that a longer period had not been allowed, held that eleven hours was a sufficient time, if due diligence had been used for taking the poll; observing: — “I confess this is the only part of the case on which I have felt any real difficulty. It is not very easy to determine what time should be allowed, so as to give every person entitled to vote an opportunity of recording his vote; and all that can be said is, that where no custom exists, a reasonable time should be given, and which I consider is the result of the *Winchester case* (1), which I have adverted to already. But it can hardly be said, that it was decided that the time allowed in that case was only a reasonable time for polling one hundred and eighty voters. One hundred and eighty persons only were entitled to vote; and it cannot be contended that the result of that case is, that the whole of the time was necessary for them to record their votes. The question was not as to the time solely; and it was decided, that that was a question of custom. Mr. Justice Le Blanc says, ‘If there had been no custom, there would have been a difficulty in the case; but if there be a custom to conclude the poll at a certain time, that being a reasonable time, the voters must tender their votes within it; and this is fit to be tried.’ And Lord Ellenborough, after stating that the custom was a sufficient foundation for the Court to go upon, observes, ‘that if there were no custom, there must be some limit, if the limit were assigned by a competent authority, and were in itself reasonable. Now, putting out of question the resolution of the vestry on the first day to determine the election at four o’clock on the evening of the second day, it still appears that for two hundred years past there had been no instance of an election of churchwarden continuing beyond four o’clock on the second day: I see nothing unreasonable in that limit.’ There then the time of the determination of the poll was previously fixed at four o’clock of the second day, and it appeared, that in no instance had the election continued beyond that period for two hundred years past; and this was held to be a reasonable time, not with reference, I apprehend, to the number of voters, one hundred and eighty; but altogether, with reference to the custom, and a mandamus was directed to issue in that case. I cannot, therefore, consider that this case determines any thing more than that where a custom prevails, the custom shall rule; but where there is no custom, that a reasonable time should be allowed for persons to give their votes.”

Power of
Vestries.
Control in
parish matters.

The vestry has the right to investigate and restrain the expenditure of the parish funds, and to determine the expediency of enlarging or altering the parish churches and chapels, or of adding to or disposing of the “goods and ornaments” connected with those sacred edifices. The election of some of the parish officers is either wholly, or in part, to be made by the vestry; and it has either directly or indirectly a superintending authority in all the weightier matters of the parish. (2)

If a vestry be called, every parishioner is bound to attend; or if he do not, he is bound by the acts of those who do. (3)

(1) 7 East. 573.

(2) Steer's P. L. by Clive, 273.

(3) *Clutton v. Cherry*, 2 Phil. 580.

Those who impede or obstruct vestrymen in the exercise of their right to attend, will be held responsible, as for a personal injury. And to this effect is the case of *Phillybrown v. Ryland* (1), which was as follows: "The plaintiff brought a special action on the case, for excluding him from the vestry-room; and upon demurrer the Court made no difficulty, but that such an action was maintainable: however, in this case, they gave judgment for the defendant, it not being averred that the parish had any property in this room, or right to meet there, so that for aught appears it might be the defendant's own house, and then he might let in whom he pleased, and refuse the rest. And this was a fault in substance, and needed not be shown for cause of demurrer." (2)

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Responsibilities and irresponsibilities of vestrymen.

The acts of one vestry are not absolutely binding on a succeeding vestry, and they may be confirmed or rescinded by such succeeding vestry; but the confirmation of the succeeding vestry is not necessary to make the acts of the preceding one valid (3); and the acts of a vestry may be valid, though the vicar was not present; for he is not an integral part of the vestry.

Succeeding vestry superseding the acts of preceding vestry.

The vestry, as such, has no authority whatever in the distribution of pews; the churchwardens are not bound to follow their directions; at the same time the sense and opinion of the vestry ought to have weight with them. (4)

Distribution of pews.

By stat. 58 Geo. 3. c. 69. s. 2. such of the inhabitants present as shall think proper may sign the proceedings. But they incur no separate or individual responsibility for anything which may be done in pursuance of a resolution of vestry so signed by them. Thus, vestrymen who signed a resolution ordering the parish surveyor to take steps for defending an indictment for not repairing a road, were held not to be responsible for the payment of the attorney employed by the surveyor (5); for, in signing the resolution, they act merely as vestrymen, without any intention of becoming individually responsible.

Stat. 58 Geo. 3. c. 69. s. 2. Liabilities of vestrymen.

Signing the minutes.

Where several parishioners joined at a vestry meeting in signing an order authorising two churchwardens to put a new roof on the parish tower, and both concurred in giving orders for that purpose, and one of them (the plaintiff) paid the artificers; and a rate for reimbursing them having been quashed, the plaintiff sued the defendant, being the other churchwarden, for a moiety of the money so paid:—It was held, that the defendant could not insist on those parishioners who had signed the vestry order being joined with him as co-defendants in the action. (6)

If several parishioners in vestry sign a resolution in the vestry minute-book, stating that they approve of an action brought by the surveyor of the highways against A., and that they do thereby guarantee to him all legal expenses that are or may be incurred by him in prosecuting that suit, this binds them personally. (7)

The vestry clerk is chosen by the vestry, and he acts as registrar or secretary thereto; but he has no vote upon or right to take part in the questions

VESTRY CLERK.

(1) As reported in 1 Str. 624., though in 2 Ld. Raym. 1388. it is said, that the Court gave no opinion upon this point.

(2) *Vide etiam* 17 Vin. Abr. tit. *Vestry* (A).

(3) *Mawley v. Barbet*, 2 Esp. N. P. C. 687.

(4) *Per* Sir John Nicholl in *Pettman v. Bridger*, 1 Phil. 316.; *vide ante*, tit. "Pews."

(5) *Sprott v. Powell*, 3 Bing. 478.; *et vide Lanchester v. Frexer*, 2 *ibid.* 361.

(6) *Lanchester v. Tricker*, 8 Moore, 20. 1 Bing. 201.

(7) *Heudeburch v. Langton*, 3 C. & P. 566. 10 B. & C. 546.

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submitted to the vestry. His business is to attend at all parish meetings, and to draw up and copy all orders and other acts of the vestry, and to give out copies thereof when necessary; and therefore he has the custody of all books and papers relating thereto. (1)

Custody of the books.

But although it is his duty to produce such books and papers, and permit copies to be taken for the ordinary parish purposes, or when they are wanted for the purpose of advancing any parochial right, he cannot be compelled to furnish such documents, if they are required for any personal object. The Court, therefore, refused to compel a vestry clerk to produce documents from the parish chest in his custody, it being in effect to furnish evidence against himself, in an action of libel brought against him by an inhabitant of the parish. (2)

But if the parish books be in the custody of any other person, it seems the vestry clerk may have a mandamus to compel the delivery of them to him (3): though in a later case, where the application was against a churchwarden, Lord Ellenborough said, "If the muniments belong to the vestry clerk as annexed to his office, he may bring an action of detinue or trover;" and his lordship refused the rule. (4)

**Stat. 58 Geo. 3.
c. 69 s. 6.
Preservation of
parish books
and papers.**

By stat. 58 Geo. 3. c. 69. s. 6. the vestry books, rates, and assessments, accounts, and vouchers of churchwardens, overseers of the poor, and surveyors of the highways, and other parish officers, and all certificates, orders of justices, and of courts, and all other parish books, writings, and papers, are to be kept by such person, and in such place and manner as the inhabitants in vestry shall direct.

Duration of office.

The office of vestry clerk is not a fixed and permanent one, for which a mandamus will lie. It depends altogether on the will of the inhabitants, who may elect a different clerk at each vestry. Neither is any salary annexed to this situation. With regard to any supposed agreement made by the parishioners that this should be an annual office, it could not be obligatory longer than the parties chose to fulfil it, for it might be revoked at the next vestry. (5)

THE BEADLE.

The beadle (6) is also chosen by the vestry, and his business is to attend the vestry, to give notice to the parishioners when and where it is to meet, and to execute its orders as their messenger or servant. (7)

SELECT VESTRIES BY CUSTOM.**2. SELECT VESTRIES BY CUSTOM.**

Prescription and constant immemorial usage, the basis of a select vestry by custom.

Prescription and constant immemorial usage seem to be the basis and only support of a select vestry by custom.

Select vestries appear to have grown from the practice of choosing a number of persons yearly to manage the concerns of the parish for that year: which by degrees came to be a fixed method, and the parishioners lost not

(1) Shaw's P. L. 54.

(2) *May v. Gwynne*, 4 B. & A. 301.

(3) *Rex v. Croydon (Churchwardens of)*, 5 T. R. 713.

(4) *Anon.* 2 Chitt. 255.

(5) *Rex v. Croydon (Churchwardens of)*, 5 T. R. 714.

(6) *Vide ante*, tit. BEADLES.

(7) Shaw's P. L. 54.

only their right to concur in the public management as often as they would attend, but also in most places, if not in all, the right of electing the managers. And such a custom, of the government of parishes by a select number, has been adjudged a good custom, in that the church-wardens accounting to such number was adjudged a good account. (1)

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In some parishes these select vestries having been thought oppressive and injurious, great struggles have been made to set aside and demolish them. (2)

And no wonder that it has been so in parishes where by custom they have obtained the power to choose one another; for it is not to be supposed, but that if they are guilty of evil practices they will choose such persons as they think will connive at or concur with them therein. (3)

The legality of a select vestry may, it seems, be tried incidentally to the principal matter of a suit in the Ecclesiastical Courts. Thus in questions of subtraction of church rate, the Court having jurisdiction on the subject-matter, is bound, unless stopped by prohibition, to proceed to the trial of a select vestry, by which the rate was made; and the prohibition must be in the particular suit; for if other parties before the Court upon the same question have been stopped by prohibition, this will not authorise the refusal of the Court to proceed with the pending cause. (4)

Customs where
triable.

But wherever a custom is in dispute, the proper tribunal is a court of common law; and a prohibition will in all such cases be granted, if sufficient appears in proof of the alleged custom, and that the matter in dispute in the inferior court depends upon the custom. (5)

It was upon the foundation and by reason of prescription and constant immemorial usage, that the select vestry of the parish of St. Mary-at-Hill, in London, was confirmed and established in the King's Bench in *Batt v. Watkinson* (6): and since that case, the select vestries of St. Saviour's and St. Olave's in Southwark have been set aside and demolished for want of proof of such prescription and immemorial usage. (7)

A select vestry cannot be constituted by a faculty from the bishop (8); and being in derogation of the common rights of parishioners, can only be sustained by immemorial usage, or by act of parliament. (9)

Until stat. 59 Geo. 3. c. 12. select vestries existed by custom or prescription alone; and as that statute merely relates to the maintenance of the poor, wherever a select vestry assumes to itself the management of the affairs of a parish, its authority must rest upon the foundation of special usage from time immemorial; and no such vestry, unless established under the above, or some local statute, can have any other legal origin.

A custom to be valid must have existed immemorially; and no custom can prevail against an express act of parliament, since the statute itself is a proof of a time when such a custom did not exist.

Essentials of
a custom.

The memory of man is taken in law to run to the beginning of the reign of Richard I.; consequently, if it can be shown that the custom commenced at any period since, or did not exist before that period, it is invalid. But

(1) Gibson's Codex, 219. 1 Burn's E. L. 415. (r).

(2) Shaw's P. L. 50.

(3) 1 Burn's E. L. 415. (r).

(4) *Goodall v. Whitmore*, 2 Hagg. 372.

(5) *Batt v. Watkinson*, 2 Lutw. 1027. *Vide* tit. PROHIBITION.

(6) *Ibid.*

(7) Shaw's P. L. 51.

(8) *Berry v. Banner*, Peake, N. P. C. 212.

(9) *Goodall v. Whitmore*, 2 Hagg. 374.

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Must be con-
tinuous.

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a regular usage for twenty years, unexplained and uncontradicted, is sufficient to warrant a jury in finding an immemorial custom. (1)

A custom must be continuous; any interruption would cause a temporary cesser: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the right; for an interruption of the possession only for ten or twenty years, will not destroy the custom. As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove.

In *Golding v. Fenn* (2) Lord Tenterden observed, "It appears by the evidence, that in the year 1662 a faculty was obtained from the Bishop of London, naming forty-nine persons, together with the vicar and churchwardens, as the select vestry, and appointing that number in future to be kept up by election, to be made by ten at least, together with the vicar and churchwardens. In the year 1673, this number of ten was, by another faculty, reduced to seven. These faculties have since been constantly acted upon, have been considered as governing the parish, and treated as a legal foundation of the practice that has since prevailed. It is clear that these faculties have no validity in law. As to the constitution of the first vestry thereby appointed, it appears that ten out of the fourteen vestrymen, exclusive of the vicar and churchwardens, who were present at the vestry holden immediately before the promulgation of the first faculty, are part of the forty-nine named in that faculty. Now if the vestry, as appointed by the faculty, and as it has since continued, were inconsistent with the vestry previously existing by the custom, there would be more weight in this objection than can at present be given to it. It is not inconsistent with a custom fixing no definite number, that, for a certain period, the vestry should be considered as consisting of a definite number. If there may be any reasonable number, forty-nine may be thought to be that number, and may be considered as the proper number. Suppose a vestry, consisting of twelve or eighteen persons, should have come to a resolution to increase their number to forty-nine, and should do so, and recommend that number to be kept up in future, and that this resolution and recommendation should be followed in practice for a century and a half, nothing inconsistent with the antecedent usage would in fact be done. The resolution would have no binding force; it might be departed from, and a greater or less number chosen, if the existing body should think fit. And the case would be the same, even if it should appear, that during that time the vestry and the parishioners had thought the resolution binding upon them, and had acted under that opinion. And this is precisely the case of these faculties, and of the opinion and usage that have since prevailed. I have already observed that ten members of the old vestry became members of the new; and, therefore, the old vestry, or at least a majority thereof, may be considered as having acquiesced in the new. And it is as competent to the vestry to increase or diminish their number, as if no faculty had ever

(1) *Rex v. Joliffe*, 2 B. & C. 54. 2 Saund. 175. (a, d). *Jenkins v. Harrey*, 1 C. M. & R. 877. Peake's Evid. 336. Stephens on

Nisi Prius, tit. EVIDENCE, 1559.
(2) 7 B. & C. 781.

existed. And as the practice is not inconsistent with the custom, we are of opinion that the custom has not been destroyed, but still remains as the law of the parish."

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CUSTOM.

But if the right to hold a select vestry by custom be discontinued, even for a day, the custom is at an end. (1)

It is also requisite to the legality of a custom, that it shall have been peaceable, and acquiesced in, not subject to contention and dispute; for as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting. (2)

Must be ac-
quiesced in.

Customs must be reasonable, or rather, taken negatively, they must not be unreasonable, which is not always, as Sir Edward Coke says (3), to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it suffices, if no good reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the 3rd of October, would be good, and yet it would be hard to show the reason why that day in particular is fixed upon, rather than the day before or after. But a custom that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad; for, peradventure, the lord will never put in his, and then the tenants will lose all their profits. (4)

Must be reason-
able.

A custom by which a select vestry should consist of an indefinite number of members, to be filled up at its own choice, without either maximum or minimum being fixed by the custom, has been held not to be unreasonable, the dictum of Lord Kenyon in *Berry v. Banner* (5) being thus overruled.

In *Golding v. Fenn* (6), where it was objected that a custom for a select vestry of an indefinite number of persons, continued by election of new members made by itself, and not by the parish at large, was void in law, Lord Tenterden observed, "It was very strenuously urged, that unless a number be fixed, by the custom, below which the vestry must not fall, a vestry filling up its numbers at its own choice may allow itself to be reduced to two or three only, exclusive of the vicar and churchwardens, and thereby the whole government of the parish, as far as relates to the church and its management, and the churchwardens' accounts and other matters of that kind, may fall into the hands of a number of persons much too small to secure reasonable and proper management, and due attention to the interest of the inhabitants of the parish.

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"It was also objected, that if the number be not limited, the vestry may consist of too many persons, even of the whole parish. This point, however, was little urged, and there is obviously no weight in it; the great complaint against select vestries being, that they consist not of too many persons, but of too few: and if a maximum had been fixed by custom in the very remote times to which custom must go back, the number that might have been proper in those times might, and probably would, be too small for the great increase of population that has gradually taken place. We are also

(1) 1 Black. Com. 77.

(2) Ibid.

(3) 1 Inst. 62.

(4) Co. Copyh. s. 33.

(5) Peake, N. P. C. 216.

(6) 7 B. & C. 779.

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of opinion, that a custom of this kind is not void in law for want of a minimum. But although we are of this opinion, as a matter of law, I would by no means have it understood that we think the evidence or the verdict in the present cause establishes the fact, that there may not be a minimum in this parish. It will be quite consistent with the verdict, and not inconsistent with the evidence, that the number should never be less than the lowest that can be found in any of the lists; and this I believe will, in no list, be found so few as twelve. The form of the issue raised no question of this kind. Now, although no numerical minimum be fixed by the custom, it by no means follows as a consequence, that the number may be reduced to two or three, as the objection supposes: the law may consider it as part of such a custom as the present, that there shall be a reasonable number. I am aware that this may lead to questions, what shall be a reasonable number? Such a question, if raised, would be to be decided with reference to long established usage, and to the population of the parish. That number, which might not be too small, and not unreasonable, three or four centuries ago, in a parish in which there might not be more than a dozen substantial householders or even fewer, might not be reasonable on a change of circumstances, when, by covering fields with houses, the number might be increased more than a hundred-fold. And whatever may be thought of the degree of influence that the love of power exercises on human conduct, I believe that the love of ease does not exercise less; and as no instance is known in practice, in which two or three persons have gratuitously taken upon themselves the whole burthen of administering such of the affairs of a populous parish as belong to a vestry, I do not think there is any reason to provide in theory against such an occurrence, by requiring a definite minimum as essential to the validity of a custom. The question in this case, as in many others, turns upon the balance of convenience. We think it more convenient that a custom of this nature should leave the number undefined, capable of being regulated by reason, and varying with the changes that time produces, than that there should be any fixed point, from or below which no change of circumstances should allow a departure. We therefore think the custom good in law."

**Customs must
be compulsory
and consistent.**

Customs, though established by consent, must be, when established, compulsory, and not left to the option of every man, whether he will use them or not. Therefore, a custom, that all the inhabitants shall be rated towards the maintenance of a bridge, will be good; but a custom that every man is to contribute thereto, at his own pleasure, is idle and absurd, and indeed no custom at all.

Lastly, customs must be consistent with each other; one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent; to say which of contradictory customs, is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden, the other cannot claim a right by custom to stop up or obstruct those windows, for these two contradictory customs cannot both be good, nor both stand together: he ought rather to deny the existence of the former custom. (1)

(1) 1 Black. Com. 78.

**3. PROVISIONS OF STAT. 58 GEO. 3. c. 69., STAT. 59 GEO. 3. c. 85., AND
STAT. 59 GEO. 3. c. 12.**

Stat. 58 Geo. 3. c. 69. (1) s. 1., after reciting the expediency of regulating the manner of holding parish vestries, and the right of voting therein, enacts, that no vestry or meeting of the inhabitants in vestry of or for any parish is to be holden until public notice shall be given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days at the least before the day to be appointed for holding such vestry, by the publication of such notice in the parish church or chapel on some Sunday during or immediately after divine service, and by affixing the same, fairly written or printed, on the principal door of such church or chapel.

Stat. 58 Geo. 3. c. 69. s. 2. enacts, "that in case the rector, or vicar, or perpetual curate be not present (2), the persons so assembled in pursuance of such notice are forthwith to nominate and appoint, by plurality of votes, to be ascertained as thereafter is directed, one of the inhabitants of such parish to be the chairman of and preside in every such vestry; and in all cases of equality of votes upon any question arising therein, the chairman is (in addition to such vote or votes as he may by virtue of the act be entitled to give in right of his assessment) to have the casting vote; and minutes of the proceedings and resolutions of every vestry are to be fairly and distinctly entered in a book (to be provided for that purpose by the churchwardens and overseers of the poor), and be signed by the chairman, and by such other of the inhabitants present as may think proper to sign the same." (3)

Stat. 58 Geo. 3. c. 69. s. 3. enacts that in all such vestries every inhabitant present who, by the last rate which shall have been made for the relief of the poor, has been assessed and charged upon, or in respect of, any annual rent, profit, or value not amounting to 50*l.*, shall have and be entitled to give one vote and no more; and every inhabitant there present, who shall in such last rate have been assessed or charged upon, or in respect of, any annual rent or rents, profit or value, amounting to 50*l.* or upwards (whether in one or in more than one sum or charge), shall have and be entitled to give one vote for every 25*l.* of annual rent, profit, and value upon or in respect of which he shall have been assessed or charged in such last rate, so nevertheless that no inhabitant shall be entitled to give more than six votes; and in cases where two or more of the inhabitants present shall be jointly rated, each of them shall be entitled to vote according to the proportion and amount which shall be borne by him of the joint charge; and where

PROVISIONS OF
STAT. 58 GEO.
3. c. 69., STAT.
59 GEO. 3. c.
85., AND STAT.
59 GEO. 3.
c. 12.

Three days'
notice to be
given of ves-
tries, by publi-
cation in the
church, and
affixing on the
church door.

Stat. 58 Geo. 3.
c. 69. s. 2.
Chairman of
vestries ap-
pointed.

Chairman to
have the cast-
ing vote.

Minutes to be
entered and
signed.

Stat. 58 Geo. 3.
c. 69. s. 3.
Manner of vot-
ing in vestries.

(1) Amended by stat. 59 Geo. 3. c. 85., stat. 1 & 2 Gul. 4. c. 60., and stat. 7 Gul. 4. & 1 Vict. c. 45.; *vide etiam* stat. 4 & 5 Gul. 4. c. 76. Ecclesiastical Commissioners Rep. (Feb. 15. 1832), p. 72.

(2) The right of an incumbent to preside at a meeting of his parishioners in vestry,

was established in *Wilson v. M'Math*, 3 Phil. 67. *Vide ante*, 1328.

(3) A vestry clerk, who is called as a witness, cannot, on the ground that it may criminate himself, object to produce the vestry book kept under stat. 58 Geo. 3. c. 69. s. 2. *Bradshaw v. Murphy*, 7 C. & P. 612.

PROVISIONS OF
STAT. 58 GEO.
3. c. 69., STAT.
59 GEO. 3. c.
85., AND STAT.
59 GEO. 3.
c. 12.

Electors can-
not abridge
the time of
voting.

The common
law mode of
election.

one only of the persons jointly rated shall attend, he shall be entitled to vote according to and in respect of the whole of the joint charge.

In *Rex v. Winchester (Commissary of)* it was said, that where there is a custom to determine the period of polling, it must be abided by, provided the time be reasonable: it was also said that electors cannot abridge the time. And where there is no custom, a reasonable time should be given to allow every qualified person to tender and record his vote. (1)

The mode of voting may also be of importance to the validity of the proceedings. The common law mode of election is by show of hands, or by poll; and the party electing is then said to have a voice in the election. It is clear that, at common law, where parties have the right of voting, the restriction of voting by ballot cannot be imposed; it presents an insurmountable difficulty to a scrutiny, because no person can tell for whom a particular individual voted (2); besides, under the 58 Geo. 3. c. 69., where one person may have any number of votes to the amount of six, other objections might present themselves to voting by ballot. It is therefore evident, that the common law mode of voting ought to be adhered to. These reasons are equally cogent against voting by proxy. (3)

Should more than one person be put up on each side, a show of hands would be insufficient. (4)

And where a plurality of votes is allowed, a poll is absolutely necessary. (5)

It is no objection to an election that the chairman directed a poll without taking a show of hands, though demanded. (6)

And a person not present at the show of hands may vote at the poll. (7)

Illegal to close
the doors of a
vestry, espe-
cially during
a poll.

It is illegal to close the doors of a vestry, especially during a poll (8); and if any person be excluded and prevented from voting in consequence of the closing of the doors, it will invalidate the election. But it must be shown that persons were actually excluded before the Court will declare the election void. A poll, if demanded, should be granted; but if the subject of the vote be not legal, the Court will not enforce a poll by mandamus. (9)

In the election of churchwardens, if a poll be demanded, the votes are to be given by the qualified inhabitants present; but all qualified inhabitants (whether present or not at the show of hands) have a right to be admitted into the vestry-room and vote during such poll, although the qualified inhabitants present at the time of granting the poll resolve that the poll shall be confined to those then present.

It is not a sufficient ground for impeaching such an election (on motion for a mandamus to elect), that the poll was taken with closed doors, unless it be expressly sworn that some qualified person who meant to vote, was thereby prevented from doing so.

And it seems, that if such an instance were shown, the Court would grant

(1) *Baker v. Wood*, 1 Curt. 507. ante, 1329.

(2) Vide *Faulkner (Clerk) v. Elger*, 4 B. & C. 449. 6 D. & R. 517.

(3) Vide 17 Howell's St. Tr. 822.

(4) *Rex v. Player*, 2 B. & A. 707.

(5) *Campbell v. Maund*, 1 N. & P. 558. 5 A. & E. 874. *Rex v. Birmingham (Rector of)*, 7 A. & E. 259.

(6) Ibid.

(7) *Campbell v. Maund*, 1 N. & P. 558. 5 A. & E. 874.

(8) *Rex v. Lambeth (St. Mary)*, 8 A. & E. 356.

(9) *Rex v. St. Saviour's, Southwark*, 1 ibid. 380.

a mandamus, without inquiring strictly whether the number of persons excluded was in fact such as to affect the result of the election.

Thus in *Reg. v. Lambeth (Rector of)* (1) Lord Denman said, "There is no doubt of the law, that the ratepayers in vestry are to elect, and that, if a poll be demanded, it should be kept open for all qualified persons. If any single person had been excluded in the present case, it might have been a reason for demanding that the election should be set aside; but I do not find, by the affidavits, that any person who would have voted was shut out; and, if so, nothing has been done to render the case different from what it would have been, if the election had been decided at once. If it had appeared that any one person had been excluded, we would have gone a good way in supposing that the resolution had affected the result of the election."

PROVISIONS OF
STAT. 58 GEO.
3. C. 69., STAT.
59 GEO. 3. C.
85., AND STAT.
59 GEO. 3.
C. 12.

Judgment of
Lord Denman
in *Reg. v. Lam-
beth (Rector of)*.

In *Nightingale v. Marshall* (2) it appeared, that in the parish of W. the poor rates, according to an ancient custom, had always been made without respect to the value of property in the parish, but according to the supposed ability of the party charged:—Upon which it was held, that persons so rated were not rated in respect of annual rent, profit, or value, within the meaning of stat. 58 Geo. 3. c. 69. s. 3., and therefore were not entitled to more than one vote at vestry meetings, although rated upon more than 50*l.*; Chief Justice Abbott observing, "I give no opinion as to the validity of the rates in question. My opinion is founded entirely on the third section of the 58 Geo. 3. c. 69., which provides for a plurality of votes. By that section it was enacted, 'that every inhabitant who shall, by the last rate which shall have been made for the relief of the poor, have been assessed and charged upon or in respect of any annual rent, profit, or value not amounting to 50*l.*, shall have and be entitled to give one vote and no more; and if upon an annual rent, profit, or value, amounting to more than 50*l.*, he shall have one vote for every 25*l.* of annual rent, &c. upon which he is assessed.' Looking at this rate, I am clearly of opinion that no person in the parish of St. Mary, Whitechapel, is rated upon, or in respect of, any annual rent, profit, or value. If the rate were so made, it must be proportioned to the amount of the rent, profit, or value in respect of which it is imposed. It is not so proportioned; and it therefore appears not to have been imposed in respect of the property mentioned in the act, but in respect of some ability to contribute to the relief of the poor, measured by some other standard. I am therefore of opinion, that the provisions of the 58 Geo. 3. c. 69., respecting a plurality of votes, do not apply to the parish in question; the plaintiff, consequently, was not duly elected to the office of sexton, and a nonsuit must be entered."

Judgment of
Chief Justice
Abbott in
*Nightingale v.
Marshall*.

In *Reg. v. D'Oyly (D.D.)* and *Reg. v. Hedger* (3) it appeared, that on the election of churchwardens, a poll having been demanded, the rector granted the poll, and ordered it to be held immediately on the close of the other business, and continued for three successive days, at a time and a place in the parish deemed by him most convenient, and which he had appointed by previous notice (after the publication of a summons by the old churchwardens), in case a poll should be demanded, and he refused to put a

(1) 8 A. & E. 356.

(2) 2 B. & C. 313.

(3) 12 A. & E. 139.

PROVISIONS OF
STAT. 58 GEO.
3. C. 69., STAT.
59 GEO. 3. C.
85., AND STAT.
59 GEO. 3.
C. 12.

General elec-
toral rights of
ratepayers
under a local
act.

Judgment of
Lord Denman
in *Reg. v.*
D'Oyly (D.D.)
and *Reg. v.*
Hedger.

motion which had been proposed for a different appointment, of which a majority of the old churchwardens had given previous notice. The other business lasting till seven in the evening, he directed that the poll should commence on the following morning, at the time and place of which notice had been given, a majority of the meeting (as was alleged) dissenting. The poll was taken accordingly, and it was held to be rightly taken.

Where a local act (1) directed that, on every Easter Tuesday, the rate-payers of the four districts of Lambeth parish "in vestry assembled, or the major part of them then present," should nominate sixteen persons (each district nominating four), out of whom the justices in petty sessions should select four to be overseers:—It was held, that the power of nomination was not confined to the persons present in vestry when the names were proposed, but that, after a show of hands, a poll might be demanded, and kept open for all the rate-payers, as in ordinary cases; and that the statute containing the above clause was not a "special act" within stat. 58 Geo. 3. c. 69. s. 58., excluding the operation of s. 3.; and, therefore, that rate-payers were entitled to one or more votes on such poll, according to the amount at which they were assessed (2); Lord Denman observing, "The proper place for the election of churchwardens is some convenient place within the precincts of the church; and the rector is the proper person to preside, as of common right, and as owning the freehold of the church. And churchwardens are so far ecclesiastical officers, that the rector is entitled to interfere in bringing them into existence. The cases confirm this opinion; and a further sanction is given to it by stat. 58 Geo. 3. c. 69., which does not profess to confer this right on the rector, nor use language declaratory of it, but assumes and recognises his possession of it by enacting in s. 2. that, 'in case the rector' 'shall not be present,' the meeting shall nominate a chairman.

"Assuming, then, that he possesses this right, the question now is, what powers he has by statute, and whether he has exercised his functions according to law? Stat. 58 Geo. 3. c. 69. s. 1. requires notice of the vestry to be given (3); but does not say who is to give it. We are of opinion that the rector is the fit person; he is at the head of the parish for this purpose; and in the present case he was to nominate one churchwarden at the vestry. Then the meeting being held and a show of hands taken, some one was to declare on whom the nomination had fallen. Who was to do that? Not the body of the parishioners who had made the nomination, nor the old churchwardens, but the person presiding at the vestry, namely, the rector.

"A poll is then demanded; and it is demandable as of right; and the president of the meeting is the person to grant it. In the absence of other business, the poll should be taken immediately; if time does not allow of that, there must be an adjournment for the purpose. Then, who is to direct the adjournment? It is suggested that a majority of the voters should do so. But how is the majority to be ascertained in so large a constituency? And what is the situation of parties if the majority present decide against adjournment, so as to leave no time for a considerable part of the rate-payers to vote? Setting aside the inconvenience that might arise, if a majority of the parishioners could determine the point of adjournment, we think that the person who presides at the meeting is the proper in-

(1) Stat. 50 Geo. 3. c. xix.
(2) 12 A. & E. 139.

(3) *Ibid* stat. 7 Gul. 4. & 1 Vict. c. 4.
s. 3.

dividual to decide this. It is on him that it devolves, both to preserve order in the meeting, and to regulate the proceedings so as to give all persons entitled a reasonable opportunity of voting. He is to do the acts necessary for these purposes on his own responsibility, and subject to the being called upon to answer for his conduct if he has done anything improperly.

“It is urged, that the rector ought not to preside, because he has the nomination of one churchwarden, and as chairman he would have a casting vote, which might enable him indirectly to nominate a second. But it is clear that, as a parishioner, he might give a vote deciding the nomination: and if it be inconvenient that he should have the power in question, the legislature should have provided against it; but that has not been done.

“The case of *Stoughton v. Reynolds* (1) is a good authority, but should not be pressed to the extent to which the argument in support of this rule would carry it. As it has been explained, it does not decide that the rector may not adjourn the meeting, but only that, if he has done it so as to disturb the proceedings, the Court will not interfere.

“The case of the overseers (2) is nearly the same, except for the provisions of the local act. We are of opinion that the words ‘then present,’ in stat. 50 Geo. 3. c. xix. s. 11., do not confine the right of nomination to persons actually present at the first meeting, any more than such words would prevent voters from coming in during a poll. As to the word ‘nominate,’ it is the proper expression in this case, as the inhabitants of the district do not elect, but merely fix upon persons whose names are to be laid before the justices. We granted a rule on this point, rather from anxiety to avoid any collision with the case of *Reg. v. St. Pancras (Vestrymen, &c. of)* (3), than from any doubt which we entertained. But in that case it was necessary, that the inspectors should be ‘nominated’ before the election of vestrymen was proceeded in; here no such necessity exists; and therefore the word need not have the same effect.”

Sir Frederick Pollock, on a subsequent day of the term, submitted to the Court that their judgment in *Regina v. Hedger* had not decided the question as to plurality of votes. He admitted that, by that judgment, a mandamus could not go, requiring the justices to act upon the list carried on the show of hands; but he urged that, if the votes were improperly taken at the poll, no good list was returned at that time. He therefore moved for a rule to show cause why a mandamus should not issue to the rector and churchwardens, to convene another vestry for the purpose of nominating persons to be returned as fit to serve the office of overseer; but he stated, that he did not wish to take a rule if the Court had no doubt on the point: and the Court, without assigning any reasons, refused the rule.

By stat. 58 Geo. 3. c. 69. s. 4., “when any person shall have become an inhabitant of any parish, or become liable to be rated therein, since the making of the last rate for the relief of the poor thereof, he shall be entitled to vote for and in respect of the lands, tenements, and property for which he shall have become liable to be rated, and shall consent to be rated, in like manner as if he should have been actually rated for the same.”

PROVISIONS OF
STAT. 58 GEO.
3. c. 69., STAT.
59 GEO. 3. c.
85., AND STAT.
59 GEO. 3. c.
12.

Judgment of
Lord Denman
in *Reg. v.*
D'Oyly (D.D.)
and *Reg. v.*
Hedger.

Stat. 58 Geo. 3
c. 69. s. 4.
Inhabitants
coming into a
parish since the
last rate may
vote.

(1) 2 Str. 1045. C. T. II. 274. Fortesc.
163.

(2) *Reg. v. Hedger*, 12 A. & E. 151.
(3) 11 *Ibid.* 15.

PROVISIONS OF
STAT. 58 GEO.
3. C. 69., STAT.
59 GEO. 3. C.
85., AND STAT.
59 GEO. 3.
C. 12.

Stat. 58 Geo. 3.
c. 69. s. 5.

Inhabitants re-
fusing payment
of rates to be
excluded from
vestries.

Stat. 58 Geo.
3. c. 69. s. 6.

Preservation
of parish books
and papers.

Penalty for re-
taining or in-
juring parish
books, &c.

Recovery and
application of
penalty.

Not to affect
other proceed-
ings.

Stat. 58 Geo.
3. c. 69. s. 7.
Provisions in
relation to
parishes ex-
tended to town-
ships, &c.

Manner of giv-
ing notices of
vestries and
meetings in
special cases.

Stat. 58 Geo.
c. 69. s. 8.

By stat. 58 Geo. 3. c. 69. s. 5. "no person who shall have refused or neglected to pay any rate for the relief of the poor which shall be due from, and shall have been demanded of him, shall be entitled to vote or to be present in any vestry of the parish for which such rate shall have been made, until he shall have paid the same."

By stat. 58 Geo. 3. c. 69. s. 6. the books directed to be provided and kept for the entry of the proceedings of vestries, as all former vestry books, and all rates and assessments, accounts and vouchers of the churchwardens, overseers of the poor, and surveyors of the highways, and other parish officers, and all certificates, orders of courts and of justices, and other parish books, documents, writings, and public papers of every parish, except the registry of marriages, baptisms, and burials, are to be kept by such persons, and deposited, as the inhabitants in vestry assembled may direct; and if any person in whose hands or custody any such books, rates, &c. wilfully or negligently destroy, obliterate, or injure the same, or suffer the same to be destroyed, obliterated, or injured, or, after reasonable notice and demand, refuse or neglect to deliver the same to such persons, or to deposit the same in such place as by the order of any such vestry he may be directed, every person upon conviction, on his own confession, or on the oath of one or more credible witness or witnessess, by and before two of his Majesty's justices of the peace, upon complaint thereof to them made, shall for every such offence forfeit and pay such sum, not exceeding 50*l.* nor less than 40*s.*, as shall by such justices be adjudged and determined; and the same shall be recovered and levied, by warrant of such justices, in such manner and by such ways and means as poor's rates in arrear are by law to be recovered and levied, and shall be paid to the overseers of the poor of the parish against which the offence shall be committed, or to some of them, and be applied for and towards the relief of the poor thereof; provided, nevertheless, that every person who shall unlawfully retain in his custody, or shall refuse to deliver to any person or persons authorised to receive the same, or who shall obliterate, destroy, or injure, or suffer to be obliterated, destroyed, or injured, any book, rate, assessment, account, voucher, certificate, order, document, writing, or paper belonging to any parish, or to the churchwardens, overseers of the poor, or surveyors of the highways thereof, may in every such case be proceeded against in any of his Majesty's courts, civilly or criminally, in like manner as if the act had not been made.

By stat. 58 Geo. 3. c. 69. s. 7. all provisions, authorities, and directions in the act contained in relation to parishes, are extended to all townships, vills, and places having separate overseers of the poor, and maintaining their poor separately; and all the directions and regulations therein contained in regard to vestries are extended and made applicable to all meetings which may by law be holden of the inhabitants of any parish, township, vill, or place for any of the purposes in the act expressed; and the notices by the act required to be given of every vestry may, in places in which there shall be no parish church or chapel, or where there shall not be divine service in such church or chapel, be given and published in such manner as notices of the like nature shall have been there usually given and published, or as shall be most effectual for communicating the same to the inhabitants of every such parish, township, vill, or place respectively.

By stat. 58 Geo. 3. c. 69. s. 8. nothing in the act contained is to extend

or be construed to extend, to alter the time of holding any vestry, parish, or town meeting which is by the authority of any act required to be holden on any certain day (1), or within any certain time in such act prescribed and directed; nor is any thing in the act contained to extend to take away, lessen, prejudice, or affect the powers of any vestry or meeting holden in any parish, township, or place, by virtue of any special act, or acts, of any ancient and special usage or custom, or to change or affect the right or manner of voting in any vestry or meeting so holden.

PROVISIONS OF
STAT. 58 GEO.
3. c. 19., STAT.
59 GEO. 3. c.
85., AND STAT.
59 GEO. 3. c.
12.

Not to alter the
time for hold-
ing vestries
specially
directed; nor
to affect special
vestries.

(1) In *Rex v. St. James's, Westminster* (*Churchwardens of*) (5 A. & E. 391.) it was stated, that by stat. 1 Jac. 2. c. 22. (1685), the parish of St. James, Westminster was created, by dividing a district from the parish of St. Martin; and it was enacted, that the inhabitants of St. James's should be from time to time subject to the laws and statutes then in force, or thereafter to be made for the choice of churchwardens, &c. and such other like parish officers, and other parochial duties with in the said parish, in like manner as the inhabitants of the parish of St. Martin were or might be subject and liable unto. St. Martin's had been governed by a select vestry, and provision was made for continuing such a vestry in St. James's.

Before 1685, the practice in St. Martin's, on the election of the two churchwardens, had been, that the vestry chose them by voting certain prepared lists, (the greatest number of votes carrying the election); but, by usage, the junior churchwarden of the preceding year was re-elected of course. It did not appear how, or when, this practice originated. The power of the select vestry to choose the churchwardens was often disputed in St. Martin's, after 1685; and, for the last two years, the elections by them were discontinued; and the officers chosen according to stat. 58 Geo. 3. c. 69. No alteration was made in St. James's. It was held, that the mode of election practised in 1685 was one of the laws then in force, by which, under stat. 1 Jac. 2. c. 22., the parish of St. James was to be governed. And that the abandonment of the custom by St. Martin's did not oblige St. James's to discontinue it also.

It was agreed, that although St. James's had adopted Sir John Hobhouse's act, that made no difference.

A local act passed before the stat. 58 Geo. 3. c. 69., for the regulation of parish vestries, created the office of guardians of the poor for a particular parish, and enacted that vacancies should be annually filled up by the rated inhabitants assembled in the vestry room, who should elect persons in the room of those going out. — It was held, that after the passing of stat. 58 Geo. 3. c. 69. the inhabitants must be allowed in such election the number of votes, in proportion to their respective assessments, defined in the latter act, for that the local act did not give this vestry such a peculiar constitution

as to bring it within s. 8. of stat. 58 Geo. 3. c. 69., which preserves to vestries holden under any special act, the powers and rights of voting which they previously enjoyed. *Rex v. St. James's, Clerkenwell* (*Churchwardens of*), 1 A. & E. 317.

By a deed of feoffment of 1621, Sir Nicholas Salter, (as well in consideration of 100*l.* paid by the feoffees and the other inhabitants of Enfield, as in consideration of a free school, for ever, to be held for the instruction of the children of the inhabitants of Enfield,) granted certain lands to fourteen feoffees, to the intent that they and their heirs should pay 20*l.* a year out of the rents towards the maintenance of a schoolmaster for such school, and the residue for other purposes, provided that no act concerning the lands or their rents should be done but in a vestry or meeting of the feoffees, and ten at least of the inhabitants of Enfield, which should be vestrymen, and not feoffees, in a vestry to be held by them in a chamber over the school, or in the vestry, situate in the parish church, upon public warning, to be given in the church the Sunday before the meeting. Schoolmasters were to be elected in this way, within three months after every vacancy, and were to give a bond to three feoffees to resign the appointment upon half a year's warning by the feoffees, or any of them, so it were with the consent and agreement of the feoffees and vestrymen, or the most part of them, which should be assembled in a vestry or meeting, to be held as aforesaid, so always as at least ten of the vestrymen which were not feoffees should vote at the holding of the vestry. Two feoffees were to receive the rents, and account for them the Sunday after the receipt, at a vestry, consisting of the persons before described, and held and convened in the mode before mentioned. When the feoffees should be all dead but five, four, or three, at the least, or gone to live out of the parish, the survivors were to elect fourteen others of discreet and wealthy men, then inhabitants in the parish, to be chosen by the vestrymen of the parish, or the greater number, at a vestry, to be holden in the manner before described. — It was held in *Att. Gen. v. Wilkinson* (3 B. & B. 266) that in the execution of the power of removal of the schoolmaster, the votes were to be taken *per capita*, and not according to the provisions of stat. 58 Geo. 3. c. 29.

PROVISIONS OF
STAT. 58 GEO.
3. C. 69., STAT.
59 GEO. 3. C.
85., AND STAT.
59 GEO. 3. C.
12.

Stat. 58 Geo.
3. c. 69. ss. 9,
10, & 11.
Not to extend
to London; nor
to Southwark.

To extend only
to England and
Wales.

Stat. 59 Geo.
3. c. 85. ss. 1,
2, & 3.

Persons rated
to the poor,
though not
parishioners,
may vote in
vestry accord-
ing to the value
of the premises
rated.

Clerk or agent
of corporation,
&c. may vote
in vestry ac-
cording to the
value of the
premises rated.

Non-payment
of rates to dis-
qualify from
being present
or voting in
vestry.

Stat. 59 Geo. 3.
c. 12. s. 1.

Parishes em-
powered to es-
tablish select
vestries for the
concerns of the
poor.

By stat. 58 Geo. 3. c. 69. ss. 9, 10, & 11., nothing in the act contained is to extend to any parish within the city of London; or to any parish in the borough of Southwark; and shall extend only to England and Wales.

Stat. 59 Geo. 3. c. 85., after reciting the expediency of amending stat. 58 Geo. 3. c. 69., enacts that any person who shall be assessed and rated for the relief of the poor in respect of any annual rent, profit, or value arising from any lands, tenements, or hereditaments situate in any parish in which any vestry shall be holden under stat. 58 Geo. 3. c. 69., although such person shall not reside in or be an inhabitant of such parish, may be present at such vestry, and will be entitled to give such and so many vote or votes at such vestry, in respect of the amount of such rent, profit, or value, as by stat. 58 Geo. 3. c. 69. any inhabitant of such parish present at such vestry might give in respect of such amount, and as if such person were an inhabitant of such parish.

By stat. 59 Geo. 3. c. 85. s. 2., in all cases where any corporation, or body politic or corporate or company, shall be charged to the rate for the relief of the poor of such parish, either in the name of such corporation, or of any officer of the corporation, the clerk, secretary, steward, or other agent duly authorised for that purpose, of such corporation or body politic or corporate or company, can be present at any vestry to be holden in the parish under stat. 58 Geo. 3. c. 69., and will be entitled to give such and so many vote or votes at such vestry, in respect of the amount of the rent, profit, or value of such lands, tenements, or hereditaments as by that act any inhabitant assessed to such rate present at such vestry might or ought to have and be entitled to in respect of such amount.

By stat. 59 Geo. 3. c. 85. s. 3. no person who shall have refused or neglected to pay any rate for the relief of the poor, which shall be due from, and shall have been demanded of, him, shall be entitled to vote or to be present in any vestry of the parish for which such rate shall have been made, until he shall have paid the same; nor shall any such clerk, secretary, steward, or agent be entitled to be present or to vote, nor shall he be present or vote, at any vestry in such parish, unless all rates for the relief of the poor which shall have been assessed and charged upon or in respect of the annual rent, profit, or value in right of which any such clerk, secretary, steward, or agent shall claim to be present and vote, which shall be due, and which shall have been demanded at any time before the meeting of such vestry, shall have been paid and satisfied. (1)

Stat. 59 Geo. 3. c. 12. s. 1. (2) for the better and more effectual execution of the laws for the relief of the poor, and for the amendment thereof, enacts that the inhabitants of any parish, in vestry assembled, may establish a select vestry for the concerns of the poor of such parish; and to that end nominate and elect, in the same or in any subsequent vestry, or any adjournment thereof respectively, such and so many substantial householders (3) or occupiers within such parish, not exceeding the number of twenty, nor less than five, as shall in any such vestry be thought fit

(1) Stat. 59 Geo. 3. c. 85. was amended by stat. 7 Gul. 4. & 1 Vict. c. 45., stat. 1 & 2 Gul. 4. c. 60., and stat. 4 & 5 Gul. 4. c. 76.

(2) Stat. 4 & 5 Gul. 4. c. 76. in effect repealed this statute, and substituted other provisions.

(3) *Substantial householders* : — Any magistrate may be a member of a select vestry under this statute, and an overseer may be elected a member, notwithstanding he would be a member *virtute officii*. *Res v. Adams*, 2 A. & E. 409.

to be members of the select vestry ; and the rector, vicar, or other minister of the parish, and in his absence the curate thereof, (such curate being resident in and charged to the poor's rates of such parish,) and the churchwardens and overseers of the poor for the time being, together with the inhabitants who shall be nominated and elected as aforesaid, (such inhabitants being first thereto appointed by writing under the hand and seal of one of his majesty's justices of the peace, which appointment he is hereby authorised and required to make,) are to be and constitute a select vestry for the care and management of the concerns of the poor of such parish, and any three of them, (two of whom shall neither be churchwardens nor overseers of the poor,) shall be a quorum (1); and when any inhabitant elected and appointed to serve in any such select vestry shall, before the expiration of his office, die or remove from the parish, or shall become incapable of serving, or shall refuse or neglect to serve therein, the vacancy which shall be thereby occasioned is, as soon as conveniently may be, to be filled up by the election and appointment, in manner aforesaid, of some other substantial householder or occupier of such parish, and so from time to time as often as any such vacancy shall occur ; and every such select vestry is to continue and have power to act from the time of the appointment thereof until fourteen days after the next annual appointment of overseers of the poor of the parish shall take place, and may be from year to year, and in any future year, renewed in the manner before directed ; and every such select vestry is to meet once in every fourteen days, and oftener if it shall be found necessary, in the parish church, or in some other convenient place within the parish ; and at every such meeting a chairman is to be appointed by the majority of the members present, who is to preside therein ; and in all cases of equality of votes upon any question there arising, the chairman is to have the casting vote ; and every such select vestry is empowered and required to examine into the state and condition of the poor of the parish, and to inquire into and determine upon the proper objects of relief, and the nature and amount of the relief to be given ; and in each case is to take into consideration the character and conduct of the poor person to be relieved, and to be at liberty to distinguish in the relief to be granted between the deserving and the idle, extravagant, or profligate poor ; and such select vestry is to make orders in writing for such relief as they shall think requisite, and to inquire into and superintend the collection and administration of all money to be raised by the poor's rates, and of all other funds and money raised or applied by the parish to the relief of the poor ; and where any such select vestry shall be established, the overseers of the poor are required, in the execution of their office, to conform to the directions of the select vestry, and are not (except in cases of sudden emergency or urgent necessity, and to the extent only of such temporary relief as each case shall require, and except by order of justices, in the cases after provided for) to give any further or other relief or allowance to the poor, than such as shall be ordered by the select vestry.

PROVISIONS OF
STAT. 58 GEO.
3. c. 69., STAT.
59 GEO 3. c.
85., AND STAT.
59 GEO. 3. c.
12.

Stat. 59 Geo.
3. c. 12. s. 1.

Vacancies how
supplied.

Meetings and
duties.

By stat. 59 Geo. 3. c. 12. s. 3., every select vestry, to be established by

Stat. 59 Geo.
3. c. 12. s. 3.

(1) *Any three of them shall be a quorum* :—Except when specially provided for by statute, it is a general rule of law, that where a limited number of persons are

to perform a public duty, there must be a majority of the whole body assembled, and that a majority of the persons assembled at such a meeting may act.

PROVISIONS OF
STAT. 58 GEO.
3. c. 69., STAT.
59 GEO. 3. c.
85., AND STAT.
59 GEO. 3. c.
12.

Minutes kept
of proceedings
of select ves-
tries.

Stat. 59 Geo.
3. c. 12. s. 4.
Notice of hold-
ing vestries.
Election of
members, &c.

When a select
vestry cannot
elect another
select vestry.

the authority of the act, is to cause minutes to be fairly entered in books, to be for that purpose provided, of all their meetings, proceedings, resolutions, orders, and transactions, and of all sums received, applied, and expended, by their direction; and such minutes are from time to time to be signed by the chairman; and are, together with a summary or report of the accounts and transactions of the select vestry, to be laid before the inhabitants of the parish in general vestry assembled, twice in every year, that is to say, in the month of March and in the month of October, and at such other times as the select vestry shall think fit; and the minutes, proceedings, accounts, and reports of every select vestry are to belong to the parish, and be preserved with the other books, documents, accounts, and public papers thereof.

By stat. 59 Geo. 3. c. 12. s. 4. the churchwardens and overseers of the poor are to cause ten days' notice at the least to be publicly given, in the usual manner, of every vestry to be holden for the purpose of establishing any select vestry, or of nominating and electing the members, or any member thereof, and of every vestry to be holden for the purpose of receiving the report of the select vestry; and every notice of any such vestry is to state the special purpose thereof. (1)

A select vestry for the management of parochial affairs, existing by ancient custom, cannot elect another select vestry for the management of the poor, within stat. 59 Geo. 3. c. 12. (2)

PARTICULAR
SELECT VES-
TRIES BY
STATUTE.

Stat. 10 Anne,
c. 11. s. 20.

4. PARTICULAR SELECT VESTRIES BY STATUTE.

Stat. 10 Anne, c. 11. (for building fifty new churches) s. 20. enacts that five or more of the commissioners, with the consent of the bishop or ordinary of the place, shall appoint a convenient number of sufficient inhabitants of each new parish created by the act to be vestrymen; and from time to time, upon the death, removal, or other voidance of any such vestrymen, the rest or majority of these may choose another, being an inhabitant and householder in the parish.

There are numerous private acts for building particular churches, in which provisions are made for the appointment of select vestries, according to the peculiar exigencies of each case: an enumeration of them, however, could tend to no practical object.

Stat. 59 Geo. 3.
c. 134. s. 30.
VESTRIES UN-
DER CHURCH
BUILDING
ACTS.

By stat. 59 Geo. 3. c. 134. s. 30. in every district, parish, or division of any parish or district, chapelry or consolidated chapelry, in which any church or chapel shall be built, acquired, or appropriated under the provisions of the act, or of stat. 58 Geo. 3. c. 45., in which there shall not be a distinct vestry belonging to such district or division, a select vestry, consisting of so many persons as shall be directed by the commissioners in that behalf, is to be appointed by the commissioners, with the advice of the bishop of the diocese, out of the substantial inhabitants of the district or division, or district chapelry, or consolidated chapelry, for the care and

(1) *See vide* stat. 4 & 5 Gul. 4. c. 76.
Vide Rex v. Adams, 2 A. & E. 409. for a
definition of substantial householders.

(2) *Rex v. Woodman*, 4 B. & A. 507.

management of the concerns of the church or chapel, and all matters and things relating thereto; and such select vestry is to annually elect or appoint the churchwarden or chapelwarden to be named on the part of the parish or chapelry, and to elect new members of such vestry as vacancies may arise by death, resignation, or ceasing to inhabit the parish; and proper pews shall be assigned and provided in every such church and chapel for the use of the church or chapelwardens.

PARTICULAR
SELECT VESTRIES BY
STATUTE.

Respecting the care and management of the concerns of the church or chapel, it was held, in *Cockburn v. Harvey* (1), that a select vestry, appointed pursuant to stat. 59 Geo. 3. c. 134. s. 30., had no power to impose a rate for the repair of the district church; Lord Tenterden observing, "This case depends upon the construction of the thirtieth section of the 59 Geo. 3. c. 134. The church was built under the powers of the act of the 58 Geo. 3. c. 45.; by the seventieth section of which it is enacted, 'that the repairs of all such district churches or chapels shall be made by the districts to which they respectively belong, by rates to be raised within the district, in like manner as in case of repairs of churches by parishes; and every such district shall be deemed in law a separate and distinct parish for that purpose.'

A select vestry appointed under stat. 59 Geo. 3. c. 134. s. 30. has no power to impose a rate for the repair of the district church.

Judgment of Lord Tenterden in *Cockburn v. Harvey*.

"Rates for the repairs of churches in parishes, by the common law, are to be made by the churchwardens and the vestry, that is, by the churchwardens and inhabitants in vestry assembled, if there be not a select vestry established by usage or act of parliament. So that, if this statute had remained unaltered, the rate in question, being made by the churchwardens and persons acting as a select vestry, would, undoubtedly, be bad. A select vestry, for purposes connected with the church, is established by the thirtieth section of the 59 Geo. 3. c. 134., which enacts, 'that in every district, parish, &c., in which any church shall be built, acquired, or appropriated, under the provisions of the said recited act (2), or this act, in which there shall not be a distinct vestry belonging to such district or division, a select vestry, consisting of so many persons as shall be directed by the commissioners in that behalf, shall be appointed by the commissioners, with the advice of the bishop of the diocese, out of the substantial inhabitants of the district, &c., for the care and management of the concerns of the church or chapel, and all matters and things relating thereto; and such select vestry shall annually elect or appoint the churchwarden or chapelwarden to be named on the part of the parish or chapelry, and shall elect new members of such vestry as vacancies may arise by death, resignation, or ceasing to inhabit the parish; and proper pews shall be assigned and provided in every such church for the use of the churchwardens thereof.'

"It was contended for the plaintiff, that the powers given to the select vestry by that section did not extend to the making a rate for the repairs of the church; and it was urged, that acts of parliament, by which any charge may be brought upon the subject, or the subject be deprived of his rights in derogation of the common law, are to be construed strictly; and several cases were quoted in support of that proposition. I shall notice only two of them, as we consider the principle to be clear. In *Fludier v.*

(1) 2 B. & Ad. 797.

(2) 58 Geo. 3. c. 45.

**PARTICULAR
SELECT VES-
TRIES BY
STATUTE.**

**Judgment of
Lord Tenter-
don in *Cock-
burn v. Harvey.***

Lombe (Sir T.) (1) Lord Hardwicke (then chief justice of this court), says, 'It has been rightly said, that this being a law to take away people's franchises, should be strictly construed.' So in the case of *Buckeridge v. Flight* (2) Mr. Justice Holroyd says, 'Where acts of parliament vary, or take away the rights of parties, they ought to be strictly construed.' Many cases on the construction of the stamp acts have been determined upon this ground. And this principle must be kept in view in putting a construction upon this thirtieth section. Under the authority of this section the select vestry was established; and such vestry, therefore, must have the care and management of the concerns of the church, and all matters relating thereto; and the question is, whether the power of making church rates be included in those words, and given thereby? Now there are many concerns of the church, and many matters relating thereto, independent of the making rates for its repairs; and the power of making such not being expressly given, can only be deemed to be given by inference and implication, if it be given at all. And, accordingly, the argument for the defendants put their case on that ground, and it was urged, that the inconvenience of allowing the power to make a rate to exist in a body distinct from the persons who have the care and management of the concerns of the church, would be so great, that the legislature must be understood to have intended to give that power by the general words used on this occasion. The Court, however, can know the intention of the legislature only from the language of a statute, and it is to interpret that language according to the rules and principles of law. The inconvenience in this case does not appear to be greater than that which must take place under the statute 59 Geo. 3. c. 12., whereby a select vestry may be appointed for the concerns of the poor, leaving the power of making rates to the persons who before possessed it, that is, to the churchwardens and overseers.

"The tenth section of the 3 Geo. 4. c. 72. does certainly afford an argument in favour of the defendants; for it is thereby enacted, that in every case in which a parish shall be divided into separate parishes for ecclesiastical purposes, or separate districts, in which select vestries shall be appointed by the commissioners, all the members of the select vestry of the original parish, residing in the district of the original church, &c., shall continue to act as the vestry of such district and church, in all matters relating to such church and the repairs thereof, or to any other ecclesiastical matters, or in distributing any proportion of any charities, &c., which may, under this act, be assigned to such district; provided that no member of any select vestry of such parish shall, after such division, act in any matters relating to any church, &c., or any repairs thereof, or any matters relating thereto, except such as are within, or relate to the division in which he shall reside; and that all members of the select vestry of such parish, resident in any other divisions of such parish, shall be members of the vestries to be appointed for the divisions where they reside. But it is obvious, that this section is confined in terms to the previous existence of a select vestry in the original parish; and it is by no means a necessary consequence, that because the legislature thought fit to give the power of making rates (assuming such power to be thereby given) to the select

(1) C. T. H. 397.

(2) 6 B. & C. 49.

vestry of a new parish taken out of an old parish, wherein a select vestry had that power before, therefore the select vestry of such a new parish shall have that power, where it was not previously vested in a body of the same description in the old parish; so that the giving of that power, in a case like the present, can at most be considered only as a matter of doubtful, and by no means of necessary, or even clear, implication. For these reasons we are of opinion, the judgment of the Court must be for the defendant."

PARTICULAR
SELECT VES-
TRIES BY
STATUTE.

By stat. 3 Geo. 4. c. 72. s. 10., in every case in which any parish or place shall be divided into separate parishes for ecclesiastical purposes, or into separate districts or chapelries, in which select vestries shall be appointed by the commissioners for such parishes under stat. 58 Geo. 3. c. 15. & stat. 59 Geo. 3. c. 134., all the members of, or persons belonging to, the select vestry of the original parish, who shall reside in or belong to the district or division of the original church or chapel of the parish or place, are to continue to act as the vestry in all matters relating to such church or chapel and the repairs thereof (or to any other ecclesiastical matters or things, or in the distribution of any proportion of any bequests, gifts, or charities which may, under the provisions of the act, be assigned to any such district or division); provided that no member of any such select vestry, after any such division, shall act in relation to any matters relating to any church or chapel, except such as are within or belonging or relate to the division in which he shall reside: and if, by reason of any such division, a sufficient number of such members of select vestry shall not remain resident in the division of the parish or place within which the original church or chapel shall be situate, according to such proportion as shall be fixed by the commissioners in that behalf, regard being had to the population of such division, and the relative proportion thereof to the population of the whole parish or place, all such deficiencies are to be filled up as deficiencies or vacancies in such parish or place have been theretofore filled up in such parish or place; but no member of any such select vestry, or inhabitant of any such parish, or place, is to vote in the supplying such deficiencies, unless resident within the division of the parish or place for which the member or members to supply deficiencies are to be chosen; and such persons so chosen are not by reason thereof to be deemed members of the vestry for any other purposes than such as relate to the church or chapel, or the ecclesiastical affairs of the division of the parish or place for which they shall be so chosen, or for the distribution of any charitable gifts or bequests therein: provided that all the members of the select vestry, resident in any other divisions of any such parish or place, shall in every case be members of such vestry as shall be appointed under the provisions of the act, or of stat. 58 Geo. 3. c. 15. and stat. 59 Geo. 3. c. 134., for the respective divisions of the parish or place in which they shall respectively reside.

Stat. 3 Geo. 4.
c. 72 s. 10.

Deficiency of
vestrymen, how
supplied.

By stat. 3 & 4 Vict. c. 60. s. 8. the power given to a select vestry appointed under stat. 59 Geo. 3. c. 134. s. 30. to elect new members of such vestry as vacancies may arise by death, resignation, or ceasing to inhabit the parish, is extended to cases where vestrymen neglect to attend the vestry meetings for the space of twelve months, provided such vestry shall have met at least three times during such twelve months; and in every such case the vestry can declare the members of such select vestry so neglecting to attend,

Stat. 3 & 4
Vict. c. 60. s. 8.
Appointment
of new vestry-
men, where
vestrymen ne-
glect to attend.

**PARTICULAR
SELECT VES-
TRIES BY
STATUTE.**

When a vestry
will not be
compelled to
appoint a sur-
veyor to certify
the proper con-
struction,
draining, &c.
of a new road.

Judgment of
Lord Tenter-
den in *Rex v.
Paddington
(Vestry of)*.

to be no longer members, and vacancies thereby created are to be filled up in the manner directed by stat. 59 Geo. 3. c. 134. s. 30., with respect to vacancies arising by death, resignation, or ceasing to inhabit the parish.

A vestry will not be compelled to appoint a surveyor to certify to the proper construction, draining, &c., of a new road, which the vestry had the power of forming under their local act, as that would cast the burden of repairing the road on the parish; and it would not be so much for the benefit of the public as of the proprietors, during the time their buildings were completing. Thus in *Rex v. Paddington (Vestry of)* (1) Lord Tenterden observed, "Here there has been a dedication to and a user by the public, but that user has been of very short duration. It was contended that the vestry were bound by this act of parliament to appoint a surveyor, and that this Court was bound (on their refusal) to order them so to do. The sixty-second section of the act is, in its terms, not an enabling but a restraining clause. It was obviously the intention of the legislature thereby to prevent the parish from being burthened with the repair of a road, intended not merely for public benefit, but, for a time at least, for the peculiar, private benefit of the persons forming it. If we were at the present time to order the vestry to appoint a surveyor, the consequence would be, that the parish would thereby be concluded, and would immediately be bound to repair the road. And inasmuch as this road has been made by the owner with a view to erect buildings on each side, several of which have been in part erected, and about eight completely finished and inhabited, and a great many more in contemplation, the effect of charging the parish with the repair of this road at the present time will be, that the parish will have to repair a road not for the benefit of the public at present, but for the private advantage of a person, so that he may have at the public expense a road to bring materials for his buildings. It can admit of no dispute, that while materials are bringing for the erection of the buildings, the road, however well formed, must sustain considerable injury. Under these circumstances, we think that, in the exercise of our discretion, we ought not at present to order the vestry to appoint a surveyor. What may be fit to be done when circumstances may change, may be a question hereafter for the consideration of the Court. That the Court has the power of considering whether justice be best advanced by directing a mandamus to issue, or by forbearing to do so, has been settled by several cases. It was laid down by Mr. Justice Ashhurst in *Rex v. Excise (Commissioners of)* (2), that such an application is an application to the discretion of the Court. The same rule was acted upon in *Rex v. Lancashire (Justices of)* (3), and in *Rex v. Buckinghamshire (Justices of)*. (4) We are of opinion that, under the particular circumstances of this case, justice will be best administered by forbearing at present to issue this writ."

**VESTRIES
UNDER STAT.
1 & 2 GUL. 4
c. 60.**

5. VESTRIES UNDER STAT. 1 & 2 GUL. 4. c. 60.

Stat. 1 & 2 Gul. 4. c. 60. s. 1., after reciting that it was expedient to provide for the election of vestries and of auditors of parish accounts in certain

(1) 9 B. & C. 460.
(2) 2 T. R. 385.

(3) 12 East, 366.
(4) 1 B. & C. 485.

parishes of England and Wales, enacts that that act, and the several provisions thereof, shall apply to and may be adopted, under and subject to the regulations therein contained, by any parish or parishes in England and Wales.

VESTRIES
UNDER STAT.
1 & 2 GUL. 4.
c. 60.

By sect. 2., when in any parish certain of the rate-payers thereof desire that the parish should come under the operation of the act, then any number of rate-payers amounting at least to one-fifth of the rate-payers of such parish, or any number of rate-payers amounting at least to fifty parishioners, may on some day between the 1st day of December and the 1st day of March deliver a requisition (1) signed by them, and describing their places of residence, to the churchwardens, or to one of them, serving for the parish, requiring the churchwardens to ascertain, according to the manner thereafter mentioned, whether or not a majority of the rate-payers of the parish wish and require that the act should be adopted therein; and which requisition may be in the form or to the tenor and effect following; (that is to say,)

Stat. 1 & 2
Gul. 4. c. 60.
s. 1.
Act may be
adopted by any
parish.
Sect. 2.
Manner of
adopting it in
parishes where
inhabitants do
not assemble in
open vestry.

“ To the churchwardens of the parish of [insert here the name of the parish].

Form of requisition.

“ We, whose names are hereunto subscribed, being rate-payers resident in the said parish, and respectively rated or assessed to the relief of the poor thereof, do hereby require you the said churchwardens to ascertain and determine the adoption or non-adoption of an act of the second year of the reign of King William the Fourth, chapter —, intituled ‘ An Act [here insert the title of the act].’

“ Dated this — day of — in the year of our Lord — .”

By sect. 3., the churchwardens on the first Sunday in the month of March next after the receipt of such requisition, must affix or cause to be affixed a notice to the principal doors of every church and chapel within the parish, specifying some day not earlier than ten days and not later than twenty-one days after such Sunday, and at what place or places within the parish, the rate-payers are required to signify their votes for or against the adoption of the act; which votes are to be received on three successive days, commencing at eight of the clock in the forenoon and ending at four of the clock in the afternoon of each day; and the notice is to be to the following effect: —

Sect. 3.
Upon receipt
of requisition,
churchwardens
to give notice
of time and
place for re-
ceiving votes.

“ The churchwardens of this parish [insert here the name of the parish] having received a requisition duly signed according to the provisions of an act of the second year of the reign of William the Fourth, chapter —, for the better regulation of vestries, the rate-payers of this parish of [insert here the name of the parish] are hereby required, all and each of them, on the — day of — next, and the two following days, to signify to the said churchwardens by a declaration, either printed or written, or partly printed or partly written, addressed and delivered to one of the churchwardens at [insert here the place], their votes for or against the adoption of the aforesaid act for the better regulation of vestries by the rate-payers of this parish.

Form of notice.

“ (Signed) — churchwardens.”

(1) *Requisition*: — It seems to be doubtful whether the provisions of this act can be

adopted upon the requisition of any other persons than the poor-rate payers.

VESTRIES
UNDER STAT.
1 & 2 GUI. 4.
c. 60.

Sect. 4.
Form of decla-
ration.

Sect. 5.
Churchwardens
to declare
whether the
votes are in
favour of adopt-
ing the act.

Sect. 6.
Rate-payers
may inspect
votes.

Sect. 7.
No person to
vote unless he
has been rated
one year.

Sect. 8.
Notice of adop-
tion of the act.

Sect 9.

By sect. 4. the declaration must be to the following effect:—

“ I, A. B., of — street [or —, place, or house], in this parish of —, vote [for or against, as the case may be] the adoption of the act of the second year of the reign of William the Fourth, chapter —, for the better regulation of vestries by this parish.”

By sect. 5., the churchwardens are carefully to examine the votes to them delivered, and compare them with the last rate made for the relief of the poor of the parish, and are empowered to call before them and examine any parish officer touching the votes, or any rate-payer so giving his vote, and after a full and fair summing-up of the votes, are by public notice, according to the form and manner thereafter prescribed, to declare whether or not two thirds of the votes given have been given in favour of the adoption of the act; but the whole number of persons voting must be a clear majority of the rate-payers of the parish; and the adoption or non-adoption of the act is to be decided by such number of votes. (1)

By sect. 6., any of the rate-payers of the parish, not exceeding five together, may inspect, at or in the vestry room, or in some convenient place within the parish, the votes so given for and against the adoption of the act, at all seasonable times within one month after such notice has been given; and the churchwardens of the parish are required carefully to preserve the votes, and to permit the examination thereof by the rate-payers of the parish at such seasonable times within the period aforesaid.

By sect. 7., no person is to be deemed a rate-payer, or be entitled to vote, or do any other act, matter, or thing as such, under the provisions of the act, unless he has been rated to the relief of the poor for the whole year immediately preceding his so voting or otherwise acting as such rate-payer, and has paid all the parochial rates, taxes, and assessments due from him at the time of his so voting or acting, except such as have been made or become due within the six months immediately preceding such voting.

By sect. 8., notice of the adoption of the act by any parish is to be forthwith given by the churchwardens for the time being of the parish in the London Gazette, and in one or more of the public newspapers circulating in the county in which the parish may be situated, and by affixing a notice of the same to the principal doors of every church and chapel within the parish; which notice is to be to the following effect:—

“ Parish of [here insert the name of parish].

“ Notice is hereby given, that the above-named parish has adopted the act of the second year of the reign of King William the Fourth, chapter—, intituled ‘An Act [here insert the title of the act];’ and that the numbers of the majority and minority of votes given for and against the adoption of the said act are as follows; that is to say, — votes for the adoption thereof, and — votes against the adoption thereof.

“ Dated this — day of — in the year of our Lord —.

“ (Signed) — churchwardens.”

By sect. 9., if the rate-payers determine against the adoption of the act,

(1) It seems that a parish, having a particular custom as to the manner of choosing churchwardens, is not affected in this par-

ticular by the adoption of the act. *Rev. St. James, Westminster, 5 A. & E. 591.*

another requisition for the same purposes cannot be made within three years after such determination.

By sect. 10., in any parish in which public notice of the adoption of the act shall be given, it is immediately to become the law for electing vestrymen and auditors of accounts of the parish in manner thereafter mentioned.

By sect. 11., any churchwarden, rate-collector, overseer, or other parish officer refusing to call meetings according to the provisions of the act, or refusing or neglecting to make and give the declarations and notices directed by the act to be made and given, or to receive the vote of any rate-payer, or altering, falsifying, concealing, or suppressing any vote or votes, will be guilty of a misdemeanour.

By sect. 12., on some Sunday at least twenty-one days previously to the day of annual election of vestrymen, notice of election pursuant to the act, signed by the churchwardens, is to be affixed to the principal doors of every church and chapel of the parish, and at other usual places, in the following terms:—

“Parish of [here insert name of parish].

“The parishioners duly qualified according to the provisions of the act of the second year of the reign of King William IV., intituled An Act [here insert the title of the act],” are hereby required to meet at — on the — day of —, conformably to the provisions of the said act, and then and there to consider of and elect fit and proper persons to be vestrymen and auditors of accounts of the parish of — for the ensuing year; (that is to say,)

“—, members of the vestry.
“—, auditors of accounts.”

By sect. 13., the churchwardens may summon the rate-collectors to attend them on the day of annual election, in order to assist them in ascertaining that the persons presenting themselves to vote are parishioners rated to the relief of the poor of the parish, and duly qualified to vote at the election.

By sect. 14., on the day of annual election of vestrymen and auditors in any parish adopting the act, all parishioners then rated, and having been rated to the relief of the poor, one year, and desirous of voting, are to meet at the place appointed for the election, then and there to nominate eight rate-payers of the parish as fit and proper persons to be inspectors of votes, four of such eight to be nominated by the churchwardens, and the other four to be nominated by the meeting; and after such nomination the parishioners are to elect such parishioners duly qualified as may be there proposed for the offices of vestrymen and auditors; and the chairman at such meeting is to declare the names of the parishioners who have been elected by a majority of votes at such meeting.

On the nomination of the eight inspectors to act in the election of vestrymen under stat. 1 & 2 Gul 4. c. 60. s. 14., the decision of the chairman, on a show of hands that one or the other party has a majority, is not conclusive, but he is bound, on requisition from either side, to take steps for ascertaining the numbers; and it seems that the proper course on such requisition is to divide the meeting. (1) But in *Reg. v. St. Mary*,

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c. 60.

No similar requisition to be made within three years.

Sect. 10.
The act to take effect in all parishes in which its adoption has been notified.

Sect. 11.
Penalties on churchwardens and others refusing to call meetings, &c.

Sect. 12.
Notices of election to be given.

Sect. 13.
Rate collectors, &c. may be summoned to assist at the election.

Sect. 14.
Form of proceeding at annual elections.

Nomination of inspectors of votes.

Decision of the chairman on a show of hands, that one or the other party has a majority is not conclusive.

(1) *Reg. v. St. Pancras (Vestrymen of)*, 11 A. & E. 15.

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UNDER STAT.
1 & 2 GUL. 4.
c. 60.

Existence of
party feeling in
the chairman.

Where an elec-
tion has been
irregularly con-
ducted.

Judgment of
Lord Denman
in *Reg. v. St.
Pancras (Ves-
trymen of)*.

Lambeth (Churchwardens of) (1) it was holden, that at an election of parish officers, the poll, if demanded upon a show of hands, must be taken of the rate-payers generally; and the election is a nullity, if the poll be confined to persons present when the poll is demanded.

The mere existence of party feeling in the chairman is not sufficient ground for impeaching a nomination of inspectors under the statute; but if, after improperly refusing to ascertain the numbers voting, he has declared certain persons to be the inspectors nominated by the meeting, and the election of vestrymen has thereupon taken place, the Court will grant a mandamus for a new election, although a considerable time has elapsed. And if four inspectors have been improperly declared to be nominated by the meeting, such mandamus will be granted, although the other four inspectors were duly nominated by the churchwardens, and officiated at the election. Thus in *Regina v. St. Pancras (Vestrymen of)* (2) Lord Denman stated, "This was an application to compel proceeding to a new election of vestrymen, on the ground that the election which took place in May was a nullity, the sense of the meeting in respect of the nomination of inspectors not having been duly taken by the churchwardens who presided there.

"The act 1 & 2 Gul. 4. requires, as preliminary to the election of vestrymen, the nomination of eight inspectors, four by the churchwardens, four by the meeting. On this occasion the churchwardens, having nominated their four, called upon the meeting to nominate four others. Two lists of four were accordingly prepared by the two parties, and a show of hands having been required on both successively, the churchwardens expressed their decision in favour of one set; upon which the friends of the other demanded a division of the voters present, that the members appearing on each side might be counted. This course the churchwardens refused to take, though frequently pressed to do so, and declared the election carried by the show of hands as at first.

"The affidavits in support of the rule went into a vast deal of extraneous matter, not enough connected with our immediate subject to require notice here. Expressions of the more active churchwarden were deposed to, showing a determination to favour his own party, which were by no means satisfactorily explained away by himself. The defeated party claimed the majority of votes at the meeting, but the other party were in much greater numbers in their confident belief the other way. In arguing against the rule many propositions were laid down, which appear to us wholly untenable. It was boldly urged, that the decision of a returning officer is binding and conclusive, however partial and unfair, and in whatever degree his partiality and unfairness may have affected the result of the election. What he chooses to declare, (it was said,) must stand, though his misconduct may expose him to punishment. The claim of such a privilege refutes itself. Mere feelings of partiality in a returning officer towards the successful candidate cannot, indeed, be sufficient to vacate the election, conducted fairly and with regularity. But if proper means are taken for challenging an election good in form, but reasonably suspected to be the result of manœuvring practised by persons in authority, for selfish or party pur-

(1) 3 N. & P. 416.

(2) 11 A. & E. 15.

poses, we cannot be bound by a result so brought about, and cannot refuse to put the facts into a course of inquiry; and the temporary inconvenience, though much to be lamented, that may be produced by changes and new elections, is an evil infinitely less than the encouragement which would otherwise be afforded by this Court to an arbitrary and corrupt abuse of lawful power. The difficulty, or impossibility rather, of complying now with the act of parliament on account of the lapse of time, was not very strongly pressed. For, though the election is fixed to take place in May, yet the well known practice of this Court is to set aside vicious proceedings held at the regular period, and direct others in their place afterwards. It would be too great a triumph for injustice, if we should enable it to postpone for ever the performance of a plain duty, only because it had done wrong at the right season.

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trymen of)*.

“Then the mode of nominating inspectors required by the act was described as not essential but directory, so that non-compliance with its forms would not vitiate an election *de facto*. We need say no more in answer to this doctrine, than that the powers granted by the act to the inspectors place the fate of the election itself completely in their hands, so that every thing depends on their being faithfully nominated.

“Another argument required much more consideration. The returning officers say that those who objected to their proceeding did so on wrong grounds, and made a wrong demand upon them. They contend that only two modes of election are known to the common law, by show of hands, and by a poll; and that the objectors who complained that the decision on the show of hands was incorrect, ought to have demanded a poll; not that the meeting should be divided, and the number on each side counted; an intermediate course unknown to the ordinary practice, and which no returning officer could be bound to introduce. On this point the learned counsel in support of the rule, referring to the fourteenth section of the act, asserted that a third mode of election, or rather appointment, is thereby introduced; that the nomination of inspectors is to be made at the meeting, that is, by such as happen to be present at the meeting; that, therefore, where the show of hands is disputed, those present at the meeting must be divided, and those giving their votes on either side, counted by the officer; that this mode of ascertaining a majority is practised in both houses of parliament; and that a poll, by admitting all parishioners to come in and vote, would be inconsistent with the act which refers the decision to that meeting. [His lordship here read sect. 14. of stat. 1 & 2 Gul. 4. c. 60.]

“We are much struck by these observations, and think the reasoning at least plausible. The business of nominating inspectors is apparently intended to be begun and finished at that meeting, some reasonable precaution being taken that none but rate-payers are present; and the election of vestrymen is to follow without more delay. If the show of hands and poll were the method, the preliminary process itself might be indefinitely prolonged; for the common law right on that subject is generally understood to be, that any voter, however satisfied with the correctness of the declaration on the show of hands, yet may appeal from it to the whole body of electors (1), and keep a poll open till all have had the opportunity of attending to record

(1) *Campbell (Clerk) v. Maund*, 5 A. & E. 865. *Reg. v. Lambeth (Rector of)*, 8 *ibid.* 356.

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c. 60.

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their suffrages. Now, if the churchwardens were bound to declare the nomination of the four inspectors as made by that meeting, they had no other means of coming to a just conclusion than by dividing and counting those present, as they were required to do, supposing any doubt to exist on which side the majority appeared.

“ But we do not deem it absolutely necessary for our present decision to lay down any rule on the fourteenth section. For, whether that construction prevail, or the more ordinary method be adopted, the show of hands ought to be fairly taken. Was it so taken? A strong doubt was expressed at the time, whether the churchwardens had not made an erroneous report of the numbers on each side. It is even now sworn, by several who were present, that the majority was the other way. Nothing could be more reasonable than the demand, that the numbers should divide and be counted. If this had been done with closed doors, certainty would have been obtained in a few minutes. But the churchwardens took upon themselves to declare the respective numbers in favour of that party to which they avowedly belong, at the very moment when they refused to ascertain the truth. The affidavits now produced by them and many others, of their belief respecting this doubtful matter, do not meet the just complaint that they might have spoken with perfect knowledge; and that belief is, indeed, founded on remarks and reasonings which are detailed, and are very far from being conclusive.

“ These considerations have brought us to the opinion, that the mandamus ought to issue.”

Sect. 15.
Ballot may be
demanded.

By sect. 15., any five rate-payers may then and there, in writing or otherwise, demand a poll (1), which is to be taken by ballot, each rate-payer delivering to the inspectors two folded papers, one of which papers must contain the names of the persons for whom such parishioner may vote as fit and proper to be members of the vestry, and the other must contain the names of the persons for whom such parishioner may vote as fit and proper to be auditors of accounts; but no rate-payer is to have more than one vote for the members of the vestry, or more than one vote for the auditors of accounts to be chosen in the parish.

Sect. 16.
Mode of voting.

By sect. 16., the inspectors of votes are to deposit the folded lists, without previously opening the same, in two separate sets of balloting glasses or boxes, one set for the vestry lists, and another for the auditors' lists; and the balloting glasses or boxes are to be closed at the time fixed for the termination of the voting, that is, at four of the clock of the afternoon of the last day of election.

Sect. 17.
Duty of in-
spectors.

By sect. 17., after the close of the ballot the inspectors are to proceed to examine the votes, and if necessary continue the examination by adjournment from day to day, not exceeding four days, Sunday excepted, until they have decided upon the persons duly qualified according to the provisions of the act, who may have been chosen to fill the offices.

Sect. 18.
In case of
equality of
votes.

By sect. 18., if an equality of votes appear to the inspectors to be given for any two or more persons to fill any or either of the offices, in that case the inspectors are to decide by lot upon the person or persons so to be chosen.

(1) As to the right of demanding a poll under a local act of parliament, vide *Camp- bell (Clerk) v. Mawnd*, 5 A. & E. 865.

By sect. 19., if any person forge, or in any way falsify, any name or writing in any paper or list purporting to contain the vote or votes of any parishioner so voting for vestrymen or auditors, or by any contrivance attempt to obstruct or prevent the purposes of such mode of election, the persons so offending will, upon information laid, and conviction before any two or more justices of the peace having jurisdiction in the parish adopting the act, be liable to a penalty of not less than ten and not more than fifty pounds, and in default of payment thereof to imprisonment for a term not exceeding six nor less than three months: and any fine so levied is to be given, half to the informer who has informed against the person so offending, and the other half to the poor of the parish in which the offence may have been committed.

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Sect. 19.
Penalty for
forging or falsi-
fying any voting
list, or obstruct-
ing the election.

By sect. 20. the inspectors, immediately after they have decided upon whom the elections have fallen, are to deliver to the churchwardens, or to one of them, serving for the parish adopting the act, a list of the persons chosen by the parishioners to act as vestrymen and auditors of accounts; and the list, or a copy thereof, is to be affixed to the doors of the churches and chapels or other places chosen for the purposes of public notice in the parish.

Sect. 20.
Public notice
to be given of
vestrymen and
auditors chosen
by parishioners.

By sect. 21. any inspector wilfully making or causing to be made an incorrect return of the votes, will, upon information laid by any person before two or more justices of the peace, having jurisdiction in the parish, and upon conviction of such offence, be liable to a penalty of not less than twenty-five pounds and not exceeding fifty pounds.

Sect. 21.
Penalty on
inspectors for
making incor-
rect returns.

By sect. 22. in all parishes adopting the act the meeting of parishioners for their election of the vestrymen and auditors of accounts is to take place in the month of May in every year; provided that when a ballot is demanded at such election the same is to commence on the following day, and continue for three successive days, commencing at eight o'clock of the forenoon and closing at four o'clock of the afternoon on each day; provided that the day on which such election commences shall in the first instance be appointed by the churchwardens of the parishes adopting the act, but in every subsequent year be appointed by the vestry; provided that when by reason of the populousness of any parish, the parish has been or shall be divided into districts for ecclesiastical or other purposes, then the votes shall be taken, according to the aforesaid mode of election, in some convenient place, at the discretion of the churchwardens, in each of the several districts of such parish.

Sect. 22.
Elections to be
annual.

By sect. 23. in all parishes adopting the act the vestry appointed and elected as thereinbefore mentioned are, when the act comes into full effect, to consist of a certain number of resident householders, that is to say, twelve vestrymen for every parish in which the number of rated householders does not exceed one thousand; and twelve other additional vestrymen, that is, twenty-four vestrymen for every parish in which the rated householders exceed one thousand; and twelve other additional vestrymen, that is, thirty-six vestrymen, for every parish in which the number of rated householders exceeds two thousand; and so on at the proportion of twelve additional vestrymen for every thousand rated householders; provided, that in no case the number of vestrymen shall exceed one hundred and twenty; and that in any parish wherein a greater number of vestrymen are given

Sect. 23.
Vestry to con-
sist of not less
than 12 nor
more than 120
householders.

VESTRIES
UNDER STAT.
1 & 2 GUL. 4.
c. 60.

Sect. 24.
Proportion of
existing vestry
to go out of
office at each
of first three
elections under
the act.

by special act of parliament than these proportions will amount to, the number of vestrymen shall remain the same as given by such act of parliament; and provided that the rector, district rectors, vicar, perpetual curate, and churchwardens of the parish shall constitute a part of the vestry, and have votes therein, in addition to the vestrymen elected under the act: provided that no more than one such rector or other such minister, from any one parish or ecclesiastical district, shall *ex officio* be a part of or vote at any vestry meeting.

By sect. 24. at the first election for vestrymen after the adoption of the act in any parish, one-third of the then existing vestry, or the nearest number thereto, but not exceeding the same, are to retire from office (such portion to be determined by lot), and the parishioners duly qualified are to elect a number of vestrymen equal to one-third of the vestry to be chosen according to the provisions of the act; and on the next ensuing annual election for vestrymen, one-half, or as near one-half as may be, of the remaining part of the first aforesaid vestry are to retire from office (such portion to be determined by lot), and the parishioners duly qualified are again to elect a number of vestrymen equal to one-third of the vestry to be chosen according to the provisions of the act; and on the next, that is to say, the third, annual election for vestrymen, the last remaining portion of the old vestry are to retire from office, and the parishioners duly qualified are to elect vestrymen in like manner and number as at the two preceding elections, so as to fill up the vestry to the number of vestrymen prescribed by the act.

On this section it has been decided (1) that when the act has been adopted in a parish, there must be elected at each of the first three annual elections, one-third of the whole number of which the vestry chosen under the act is ultimately to consist; and there must be deducted, by lot, from the original vestry, at the first election, one-third of the number of vestrymen then existing (whatever the full regular number of the original vestry would be); at the second election, half the number of the original vestrymen then existing; at the third election, all the remaining original vestrymen:—that the qualification must be perfect at the time of election, but that if unqualified persons be elected, this does not avoid the election of qualified vestrymen or auditors elected at the same time:—and that where a parish adopting the act has been previously governed by a vestry established by a local act, which defined the qualification of a vestryman, and prescribed an oath, to be taken before any vestryman should be capable of acting in the execution of that local act, by which the person was to swear to his possession of the qualification by that act prescribed, which was different from that required by stat. 1 & 2 Gul. 4. c. 60., this oath is not to be taken by the vestrymen elected under the latter act. Mr. Justice Parke observes, “With respect to the number to be lotted off under the twenty-fourth section, three constructions of the clause in question present themselves. The first is that proposed by Sir James Scarlett. He argues that ‘vestry’ means the corporate body; and that one-third of the total corporate body is to be taken out at the first election, and that the vacancies which had occurred are to make a part of this third, so that the number to be

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Mr. Justice
Parke in *Rex*
v. St. Pancras,
Middlesex
(*Churchwardens of*).

(1) *Rex v. St. Pancras, Middlesex (Churchwardens of)*, 1 A. & E. 80.

taken away by lot would be only twenty-six. I think it is impossible to support this construction. It is clear, that one-third was to retire by lot; that cannot be made up of persons who have died, or resigned, before the election. The second construction is, that one-third of the total corporate body should be lotted off, without taking notice of existing vacancies; that is, in the present case, that forty should be lotted off, independently of vacancies before created. This construction appears to me equally unreasonable with the first. Suppose the original body to have been reduced by vacancies as low as forty; then, if forty had retired, none of the original vestry would have been left after the first election; and the statute gives no power for filling up the number, except by the election of the forty new vestrymen. The third and only remaining construction must therefore be adopted; that is, that the fraction to be lotted off is to be estimated upon the number of then existing vestrymen. This is what has been actually done. With respect to the method of taking the poll, it is said that the four districts of this parish satisfy the words 'divided for other purposes.' But it is sufficiently explained in the affidavits, that this is merely a division which has been made for the convenience of the collectors, and that it may be varied at any time. It is also said, that a division has been made by the annexation of a part, for ecclesiastical purposes, to the adjoining parish. But that is not a division 'into districts;' it is only a subtraction of a part from the rest of the parish. Another ground of objection was the alleged want of qualification of some of the vestrymen, under the twenty-sixth section. I have no doubt of the construction which we ought to give to this section. It is not impossible that the framer of the clause may have had a different construction in view, in the several cases of parishes without and parishes within the metropolitan police district. He may have meant that, in the former case, the rating might be on the land, and in the latter on the house only. But the rule for construing a statute is, to collect the meaning from its grammatical construction, unless that leads to an incongruity. Now, by the words of this section, it is sufficient if the householder be rated in any way; it is not necessary that he should be rated in respect of the subject of his occupation. As to this, the provision is the same for parishes in the country or in town; there are no words prescribing that the rating shall be on the subject of the occupation. I know that, in fact, persons are rated for property which they do not occupy, and therefore I construe the statute as comprehending a rating upon any property. Sir James Scarlett argues, that the latter part of the clause respecting parishes not within the metropolitan police district, shows that the rate must be on the property occupied; for that the words 'rated or assessed' must be referred to the immediate antecedents, 'houses, lands, tenements, or hereditaments.' That appears to me not to be admissible; houses are not themselves legally the subject of the poor rate; and therefore it is fair to refer the words 'rated or assessed' to 'occupier,' from which no incongruity will follow. I find no express provision that the rate shall be in respect of the property occupied; and I cannot infer such an intention. Certainly the clause is inaccurately expressed. But, supposing some of the vestrymen to be improperly elected, from want of qualification, it is clearly my opinion that there would still be no ground for issuing this mandamus. The election would be void so far only; there

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When an election may be made in one place of the parish only.

Sect. 25.
Vestrymen to quit office after three years, and one third of the whole number to be elected annually.

Sect. 26.
Qualifications of vestrymen.

Sect. 27.
Vestries appointed after the adoption of the act to exercise the authority of former vestries.

Not to affect local acts regarding vestries.

would have been elected less than forty, by the number not duly qualified. The mandamus should, therefore, direct the supplying this number only; and this disposes of so much of the objection as relates to the persons who have become qualified only since the election. I think these persons were not duly elected; but that does not make the whole proceeding void; such a construction would entail most serious consequences upon corporations. Supposing one of a common council were illegally elected, it would be monstrous to say that all elected at the same time were badly elected. The objection respecting the oath is disposed of by the fact, that the oath is no longer applicable. It was imposed to secure the existence of a particular qualification in the persons acting; the qualification is now changed, and the evidence of it is different. I am therefore clearly of opinion, that this mandamus ought not to issue, and that the rule should be discharged."

Where a parish adopting the act had previously been divided into four districts, for the more conveniently collecting the rates, and this division had been adopted for taking the poll in the election of members of parliament; and a small part also of the parish was annexed to a part of an adjoining parish, and separated from the original parish, for ecclesiastical purposes: it was held, that the election of vestrymen and auditors might be made in one place of the parish only. (1)

By sect. 25. at every annual election subsequent to the third, those vestrymen who have been three years in office are to go out of office, and the parishioners are to elect, according to the provisions of the act, other vestrymen, to the number of one-third of the total number of which such vestry is to consist, as also to fill up any vacancies which may have occurred from death or other causes; provided that any or all of the vestrymen so going out by rotation may be immediately eligible for re-election.

By sect. 26. the vestry elected under the act in any parish not within the metropolitan police district or the city of London, is to consist of resident householders rated or assessed to the relief of the poor upon a rental of not less than 10*l.*; and no person is to be capable of acting as one of the vestry unless he be the occupier of a house, lands, tenements, or hereditaments rated or assessed upon the aforementioned amount of rental within the parish for which he is to serve; provided, that if the parish adopting the act should be within the metropolitan police district or the city of London, or if the resident householders therein should amount to more than three thousand, then the vestry elected under the act is to consist of resident householders rated or assessed to the relief of the poor of such parish upon a rental of not less than 40*l.* per annum.

By sect. 27. after the adoption of the act in any parish, the vestry is to exercise the powers and privileges held by any vestry previously existing in the parish, and the authority of the vestry may be pleaded before any justices of the peace, or in any court of law, in regard to all parochial property, or monies due, or holdings or contracts, or other documents of the like nature, formerly under the control or in the keeping of the vestry of the parish; and all parish officers or boards are to account to them in this manner as they may have accounted to the vestry; provided, that nothing in the act is to be deemed, construed, or taken to repeal, alter, or invalidate any local act for the government of any parish by vestries, or for the

(1) *Rex v. St Pancras, Middlesex (Churchwardens of)*, 1 A. & E. 80.

management of the poor by any board of directors and guardians, or for the due provision for divine worship within the parish, and the maintenance of the clergy officiating therein, otherwise than is by the act expressly enacted regarding the election of vestrymen and auditors of accounts.

By sect. 28. all powers or duties to be performed by the vestry of any parish adopting the act may be exercised and performed respectively by the major part of such vestry assembled at any meeting, there not being less than five vestrymen present at a meeting of a vestry which consists of twelve or more elected vestrymen and not exceeding twenty-three, and not being less than seven vestrymen present at a meeting of a vestry which consists of twenty-four or more elected vestrymen and not exceeding thirty-five, and not being less than nine vestrymen present at a meeting of a vestry which consists of thirty-six elected vestrymen or upwards; and all orders and directions given and all contracts and engagements entered into by the vestrymen present at any such meeting, or the major part of them then assembled, are to be as valid as if the same were done by all the vestrymen for the time being, and to be binding and conclusive on all such vestrymen, provided that the same be confirmed at the next subsequent meeting of the vestry.

By sect. 29. in any case in which the vestry room of any parish in any city or town shall not be sufficiently large and commodious for any vestry meeting, such meeting can be held elsewhere within the parish or place, but not in the church or chapel thereof.

By sect. 30. at every meeting of any vestry, in the absence of the persons authorised by law or custom to take the chair, the members present can elect a chairman for the occasion, before proceeding to other business.

By sect. 31. the vestry of every parish adopting the act are to cause proper books to be provided and kept, and proper entries to be made therein of the names of the several vestrymen who attend the respective vestry-meetings, and of all orders and proceedings made or taken at such meetings; and all such books are at all reasonable times to be open to the inspection of the vestrymen, and of any person rated or assessed to the relief of the poor of the parish, and of any creditor on the rates of the parish, without fee or reward; and the vestrymen and such persons and creditors, or any of them, may take copies of or extracts from such books respectively, without paying anything for the same; and in case the clerk to the vestry, or other person having the care of such books, refuse to permit or shall not permit the vestrymen or such persons or creditors to inspect the same, or to take such copies or extracts, he is to forfeit and pay any sum of money not exceeding 10*l.* for every such offence.

And by sect. 32. the vestry are to cause books to be provided and kept, and true and regular accounts to be entered therein of all sums of money received and disbursed for or on account of parochial purposes, and of the several articles, matters, and things for which such sums of money shall have been so received and disbursed; which books are at all reasonable times to be open to the inspection of the vestrymen, and of any person rated to the relief of the poor, and of any creditor on the rates, without fee or reward; and the vestrymen and such persons and creditors, or any of them, may take copies of or extracts from such books, without paying anything for the same; and in case the clerk to the vestry, or other person

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1 & 2 GUL. 4,
c. 63.

worship, &c. except as therein expressed.

Sect. 28.
The acts of a quorum of the vestry at any meeting to be considered as the acts of the vestry.

Sect. 29.
Meetings not to be held in the church.

Sect. 30.
Meeting to elect a chairman

Sect. 31.
Proceedings to be entered in books, to be open to inspection.

Sect. 32.
Account books to be kept, and be open to inspection

VESTRIES
UNDER STAT.
1 & 2 GUL. 4.
c. 60.

Sect. 33.
Auditors to be
chosen annu-
ally.

Qualification.

Further quali-
fications of
auditors.

Disqualifica-
tions.

Sect. 34.
Mode of audit.

What is a suf-
ficient state-
ment in a man-
damus of the
adoption of the
act by the pa-
rish, and the
appointment of
auditors.

with whom such books shall remain, shall on any reasonable demand refuse to permit or shall not permit an inspection of the books, or the taking copies or extracts therefrom, he will be liable to forfeit any sum not exceeding 10*l.* for every such offence.

By sect. 33. in any parish adopting the act the parishioners duly qualified to vote for vestrymen are to elect five ratepayers of the parish who shall have signified in writing their assent to serve, to be auditors of accounts, on the first day on which the vestrymen shall be chosen after the adoption of the act, and according to the same forms of voting as are thereinbefore prescribed for the election of the vestry; but no person will be eligible to fill the office of auditor of accounts, who shall not be qualified according to the previous provisions of the act, to fill the office of vestryman of the parish, or who shall be one of the vestry of the parish. and if any person on the day of annual election shall be chosen to be both a member of the vestry and an auditor of accounts, the vestry at their first meeting after such election are to declare the person incapable of acting as vestryman: and no person will be eligible to fill the office of auditor of accounts who shall be interested, either directly or indirectly, in any contract, office, business, or employ, or in providing or supplying any materials or articles for the parish; and any person who shall be discovered, after his election, to be so interested, will cease to be an auditor.

By sect. 34. the auditors of accounts are to meet twice at least in each year, at the board room of the vestry, and (a majority of the auditors being present at such meetings) are to proceed to audit the accounts of the vestry for the preceding half year, in presence of the vestry clerk; and the vestry are, by their clerk, to produce and lay before the auditors at every such meeting a true and just statement or account in writing, accompanied with proper vouchers, of all sums of money which may have come to the hands of the vestry or of their treasurer, and also of all monies paid, laid out, or expended by them, or by any churchwardens, overseers, surveyors, or other persons employed by, and responsible to them, since the last period up to which the accounts of the vestry were audited, and in all parishes in which other boards shall have control over any part of the parochial expenditure, the auditors will have the same power of examining the accounts and officers thereof as of examining the accounts and officers of the vestry, and shall audit the accounts of the boards in the same manner as they are to audit the accounts of the vestry.

In *Rex v. St. Pancras (Church Trustees of)* (1), where a mandamus to account before auditors under stat. 1 & 2 Gul. 4. c. 60., recited that the auditors "duly appointed and acting under and by virtue of an act," &c., "in exercise of the powers given to them by the said act," had summoned the parties to account: it was held, that, in a mandamus for this purpose, it was not necessary to state more fully the adoption of the act by the parish, and the due appointment of the auditors.

The statute enacts that the auditors "shall meet twice at least in each year, at the board room of the vestry, and (a majority of the said auditors being present at such meetings) shall audit the accounts of such vestry;" and requires the vestry, "at every such meeting," to produce a true account in writing, &c.: and the auditors are to have the same power of

examining the accounts of certain other boards, and are to audit them in the same manner. A mandamus issued, calling upon a board to attend with, and produce to the auditors, their accounts, at such time and place, or at such times and places, as a majority of the auditors might appoint, and then and there give such information as to the accounts as they might be enabled to give, according to the directions of the act. On the return to such mandamus and concilium obtained on the part of the Crown, it was held, that the mandamus exceeded the authority given by the act; and that the Court could not in part enforce it, by a peremptory mandamus limited as to the place of meeting: and the Court quashed the writ; Lord Denman observing, "It is quite clear that we cannot grant a peremptory mandamus calling on these parties to do what they are not obliged to do by law. The mandamus requires the trustees to do a particular act, that is, to attend with and produce to the auditors their accounts, in any place and at any time that a majority of the auditors may think fit to appoint. The auditors had no power to make such a requisition. It may be that the power, if exercised, would not be abused, but we cannot call upon these parties to obey a demand made in terms which are contrary to the restriction of the statute. It is said that the generality of the demand is qualified by the words, 'according to the directions of the said act.' but it cannot be so qualified by an expression which would require the parties to whom the writ is directed to look into an act of parliament. It is contended, that the requisition of the writ may be partly good and partly bad, and that the valid part may be enforced; and it is true that, in *Rex v. Leicester (Justices of)* (1), on a motion being made for a mandamus, requiring more than the Court thought fit to be demanded, a rule was granted in less comprehensive terms, adopting that part of the motion which the Court thought good. But here the thing which we are required to enforce is irregular. The Court said there, that they would mould the rule so as to meet the justice of the case. But here it is not a rule, but the writ itself, that is before us. We must enforce it in the terms in which it has issued, or not at all."

In *Rex v. St. Pancras (Church Trustees of)* (2) it was held, that trustees appointed under a local act for building a new parish church, with power to make rates for that purpose and for discharging debts to be incurred under the act, are liable to account before parochial auditors appointed under stat. 1 & 2 Gul. 4. c. 60., as a board having control over part of the parochial expenditure; though the local act requires such trustees to keep an account of the assessments, receipts, and payments under the local act, to be examined and allowed once a year at quarter sessions; and though, by the same act, their accounts are open to inspection (on payment of 1s.) by any person liable to the above rates. And a mandamus calling on such trustees to produce before the auditors (without limit as to time) "the accounts" kept by them under the local act, and requiring the clerk to the trustees to produce the books of account which may concern the above accounts, is bad, as exceeding the authority given by stat. 1 & 2 Gul. 4. c. 60. ss. 34 & 35.; although such mandamus begin by reciting a demand made by the auditors upon the trustees in terms conformable to the act, and a refusal to comply with such demand;

(1) 4 B. & C. 891.

(2) 6 A. & E. 314.

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Mandamus will not be granted to compel the trustees to attend with, and to produce to, the auditors, their accounts.

Judgment of Lord Denman in *Rex v. St. Pancras (Church Trustees of)*.

VESTRIES
UNDER STAT.
1 & 2 GUL. 4.
c. 60.

Judgment of
Lord Denman
in *Rex v. St.
Paneras*
(*Church Trustees of*).

Lord Denman observing, "Two objections were made to the writ. The former rested upon grounds either urged against the original issuing of the writ, or applicable to it, and which might then have been urged. We have considered this part of the argument with much attention; but we see no reason to depart from the opinion which we formed upon the previous discussion, and we adhere to the judgment given upon that occasion, and which was not come to without much consideration. The judgment will be found in 5 N. & M. 223. (1) It is unnecessary to add anything to what is there laid down.

"The second objection arose upon the mandatory part of the writ, which was alleged to go further than was warranted either by the recitals of the writ, or by stat. 1 & 2 Gul. 4. c. 60. ss. 34 & 35., under which the writ had issued. The writ recites that the trustees had been called on to lay before the auditors of the parish a true and just statement or account in writing, accompanied with proper vouchers, of all sums which might have come to their hands, and all monies paid and expended, within the half year preceding the 31st of May then last past; and the recital also states, that the clerk had been required to bring all books of account, writings, papers, and documents which might concern the said accounts. Now, by the thirty-fourth section of that act, the auditors are to meet twice at least in each year, and to have laid before them a true and just statement or account in writing, accompanied with proper vouchers, of all sums of money that may have come to the hands of the parties, or been laid out, since the last period up to which the accounts were audited: and the power given by sect. 35. to require the production of books, &c., is limited to such as 'concern the said accounts.' And, by sect. 37., all those accounts, after auditing and signing, are to be deposited at the vestry clerk's office. The limited nature of the requisition in this case was much insisted upon in the argument for the rule, and was, indeed, material to obviate the objection of inconsistency between the provision of this statute and that of the local act of 56 Geo. 3., under which the trustees are appointed; but the mandatory part of the writ commands them to produce 'the accounts' kept by them under the act of 56 Geo. 3., and also those kept by them under the act of 1 & 2 Geo. 4., as trustees as aforesaid, and commands the clerk to bring with him the books of account, writings, papers, and documents, which may concern 'the said accounts' kept by the said trustees. These general words would certainly not be satisfied by obeying the limited requisition stated in the recital, to which alone the refusal of the trustees applies, and to which alone in our opinion the statute of 1 & 2 Gul. 4. extends. For this reason we think the writ cannot be sustained. The mandamus must, therefore, be quashed."

Sect. 35.
Auditors may
call for persons
and books.

By sect. 35. the auditors have power to summon and call before them, by a writing for that purpose, signed by any one of them, or by the clerk of the vestry, any parish officer or other person concerned in the accounts, and to require of them to attend the auditors at any meeting or adjourned meeting, and bring with them all books of accounts, writings, papers, and documents required, which may concern the accounts, and give such information as to their particulars as they may be enabled to give, and say

(1) *S. C. Rex v. St. Paneras (Church Trustees of)*, 6 A. & E. 321. n. (1).

parish officer or other person refusing so to attend, or otherwise wilfully obstructing the purposes of such inquiry, are to be deemed guilty of a misdemeanour.

By sect. 36. the accounts when audited and approved by the auditors, or by the major part of them, are to be signed by them in the presence of the clerk of the vestry who is also to affix his signature to the same; and the auditors can subjoin such remarks thereto as to them shall seem meet.

By sect. 37. the accounts, when so audited and signed, are to remain at the office of the clerk of the vestry; and are after such audit to be open and accessible for the examination, at all seasonable times, of any person rated to the relief of the poor of the parish, and of any creditor on the rates thereof: provided that nothing in the act contained relative to the appointment and duty of auditors is to debar the parishioners from any remedy by them before possessed by the law of the land.

By sect. 38. an abstract of the accounts of all monies received and disbursed by the vestry is to be twice in every year, within fourteen days after the accounts shall have been audited, made out by the vestry, either in writing or in print, and a copy of such abstract is to be delivered to all persons applying for the same, and rated or assessed to the relief of the poor of the parish, such person paying 1s. for the same; and the clerk is to cause such copies to be published either in writing or print, and distributed accordingly.

By sect. 39. in any parish adopting the act the vestry is to cause to be made out, once at least in every year, a list of the several freehold, copyhold, and leasehold estates, and of all charitable foundations and bequests, if any, belonging to the parish, and under the control of the vestry; and such list is to contain a true and detailed account of the place where such estate or charitable foundation may be situate, or in what mode and security such bequest may be invested, specifying also the yearly rental of each, and the particular appropriation thereof, together with the names of the persons partaking of their benefit (except where such benefit shall be allotted to the poor of the parish generally), and to what amount in each case, and also stating the name and description of the persons in whom such estates are vested, and the names and description of the trustees for each charity: and the list is to be open for the inspection of the ratepayers, at the office of the vestry clerk, at the same time with the accounts, when audited according to the provisions of the act.

By sect. 40. the act or any thing therein contained is not to extend or be construed to extend to invalidate or avoid any ecclesiastical law or constitution of the Church of England, save and except so far as concerns the appointment of vestries, or to destroy any of the rights or powers belonging to the archbishops, bishops, deans, or other of the clergy of the Established Church, either as individuals or as corporate bodies, or in anywise to abridge or control their ordinary jurisdiction over or relating to any matter or thing respecting the ministers thereof.

By sect. 41., in order to remove doubts as to the meaning of certain words in the act, it is enacted, that the word "justice" shall be deemed to mean justice of the peace; and that the words "person" and "party" shall be deemed to include any number of persons or parties; and that the words "justices of the peace of the county or city" shall be deemed to include

VESTRIES
UNDER STAT.
1 & 2 GEORGE 4.
c. 60.

Sect. 36.
Accounts to be
signed by
auditors.

Sect. 37.
Accounts, after
audit, to be
open to inspection.

Sect. 38.
Abstracts of
accounts to be
published fourteen
days after
being audited.

Sect. 39.
Vestry to make
out and publish
yearly a list of
estates, charities,
and bequests &c.
with the application
thereof.

Sect. 40.
Saving of ecclesiastical
jurisdiction.

Sect. 41.
Meaning of
terms used in
the act.

VICARIES
UNDER STAT.
1 & 2 GIL. 4.
c. 60.

justices of the peace of any division of a county, liberty, division of a liberty, precinct, county of a city, county of a town, cinque port, or town corporate; and that the word "parish" shall be deemed to include any liberty, precinct, township, hamlet, tithing, villa, extra-parochial place, or any place, maintaining its own poor; and that the word "rate-payers" shall include "ley-payers;" and that the meaning of the several words in the act shall not be restricted, although the same may be subsequently referred to as the singular number or masculine gender only.

Sect. 42.
As to affixing
notices.

By sect. 42. the words "church or chapel," inasmuch as regards the affixing of notices as by the act directed, are to be deemed to include all places of religious worship according to the forms of the Established Church: and in any parish or place not having a parish church or chapel, the notices are to be affixed to some public building within the limits of the parish or place.

Sect. 43.
Act not to ex-
tend to parishes
where not more
than 800 rate-
payers, except
in cities or
towns.

By sect. 43. nothing in the act contained is to extend to any parish not within or part of some city or town, in which parish there shall not be a greater number than eight hundred persons rated as householders, and having paid the rates for the relief of the poor within the year preceding that, in which the provisions of the act may be desired to be put in execution within such parish.

VICARS AND VICARAGES. (1)

Generally—Appropriations made with different privileges, in two forms—Requirements of an appropriation—Endowment of a vicar—By endowment a vicarage becomes a benefice—Endowment might either be in the act of appropriation, or by a separate instrument—Appropriation not dissolved, when vicarage dissolved—General vicarary of the law respecting rectors and vicars—Stat. 1 & 2 Vict. c. 106. ss. 35 & 41—Place of residence—No oath to be required of any vicar in relation to residence—CONVERSION OF VICARAGES INTO RECTORIES—Stat. 3 Geo. 4 c. 72 ss. 13 & 14—In cases in which the rectorial tithes, &c. shall be surrendered by impropriators, for the purpose of converting vicarages into rectories, the Church Building Commissioners can direct the same to be done accordingly—Disincuere rectors may release part of the rectorial tithes, &c., and retain the remainder in fee simple, for the purpose of converting any vicarage into a rectory by the commissioners—Stat. 1 & 2 Vict. c. 107. ss. 16, 17, & 18—Stat. 2 & 3 Vict. c. 49. s. 9.—Any church or chapel may be made a parish church, and the parish church a district church, or chapel of ease—Incumbent of the former parish church to be incumbent of the new—Provisions for the ministers of such churches.

GENERALLY.

There were no vicarages at common law: or, in other words, no tithes or profits of any kind do, de jure, belong to the vicar, but by endowment or prescription; which cannot be presumed, but must be shown on the part of the vicar. For which reason, the payment of tithes to the parson, is a sufficient discharge against the vicar. And as there was no quare impedit, for the advowson of a vicarage, before stat. 13 Edw. 1 st. i. c. 5., so neither was there a juris utrum for the possessions of a vicar before stat. 14 Edw. 3. c. 17. (2)

Where the books of the common law speak of the beginning of vicarages, some fix it in the reign of Henry III. and others in the reign of King John. They who speak of Henry III.'s reign seem to depend upon the pro-

(1) *Fide tit. ADVOWSON—APPROPRIATION—CHURCHES—CHURCHES—CHURCHES—ENDOWMENTS—ORDINATION—PRESENTATION—PRIVILEGES AND RESTRAINTS OF THE CLERGY.*

(2) *Greene v. Austen*, Yelv. 87. term March, 11. *Wharton v. Lisle*, 4 Mod. 184. *Britton v. Ward*, Palma 113.

vincial constitutions of Lyndwood, the first of which (viz. Stephen Langton's) were made in the eighth year of that prince; but there, nothing is said of vicars, except what supposes them in being. And in the beginning of King John's reign, A. D. 1200, a canon was made in the Council of London, as follows: *Decernimus etiam, ut in quâlibet ecclesiâ monachorum vel quorumlibet religiosorum, suis usibus canonicè appropriatâ, vicarius instituitur provisione episcopi, honestam et sufficientem sustentationem de bonis ecclesiæ percepturus.* (1) And (to show that the practice at least is more ancient) it was affirmed by Noy, in *Britton v. Ward* (2), that where a vicarage had been created by the pope, ann. 4 Hen. 2., the succeeding parson could not remove him, because he was vicar perpetual. (3)

In all appropriations there is generally a spiritual person attached to the same church under the name of vicar, to whom the spiritual duty, or cure of souls (as it is termed), belongs, in the same manner, as in parsonages not appropriated (or rectories), to the rector: and to whom, on the other hand, a certain portion of the tithes or other emoluments of the church, by way of exception out of those enjoyed by the appropriator, is assigned.

Appropriations were made with different privileges in two forms, the one pleno jure, sive utroque jure, tam in spiritualibus quam in temporalibus, where the interests in the benefice, both temporal and spiritual, were annexed to some religious house, and the other, non utroque jure, though pleno jure, as it is described, in temporalibus, where temporal interests only were conveyed, such as the tithes or patronage of the benefice: but the cure of souls resided in an endowed perpetual curate. (4)

Such, however, was the ambition and avarice of the religious houses to appropriate advowsons to their own use, without making proper provision for the performance of religious services in parochial districts, that lay-patronage began to threaten to draw back, that right of patronage to the churches which their ancestors had conferred (5), and legislative interference became necessary; and it was accordingly enacted, that in appropriations of benefices there should be a provision made for the poor and the vicar, and that in every licence to be made in Chancery of the appropriation of any church, there should be a perpetual vicar, not removable at the caprice of the appropriator, but properly and sufficiently endowed at the discretion of the ordinary, to do divine service, to inform the people, and to keep hospitality. (6)

Hence the sufficient endowment of a vicar was made a necessary condition of appropriating the benefice, and thus arose vicarages and endowments, which were generally made up of a part of the small tithes belonging to the benefice, which the appropriators found it difficult to collect, and a portion of the glebe or land of the parsonage.

By endowment, a vicarage becomes a benefice distinct from the parsonage, and without endowment the appropriation was not good. (7)

If the small tithes and oblations (the common allotment to a vicar) would not amount to a third share, then some part of the greater tithes, as of corn and hay, was allowed to make up such deficiency, which, indeed, was the cause of many vicarages being now so endowed.

VICARS AND
VICARAGES.

Appropriations
made with dif-
ferent privileges
in two forms.

Requisites of
an appropriation.

Endowment of
a vicar.

By endowment
a vicarage
becomes a be-
nefice.

(1) Gibson's Codex, 719.

(2) Palm. 113.

(3) Vide 40 Edw. 2. pl. 27. Spelman on Tithes, 153. Bird v. Belfh, 3 A. & E. 780.

(4) Portland (Duke of) v. Bingham, 1 Comm. 163.

(5) 1 Spel. Concl. Ang. 593.

(6) Stat. 13 Rich. 2. c. 6 & stat. 4 Hen. 4. c. 12. Britton v. Wade, Cro. Jac. 515.

(7) Wright v. Gerrard, Hob. 307. Grenadon v. Lincoln, Plowd. 496. Cdt v. Coventry (Bishop of), Hob. 140.

VICARS AND
VICARAGES.

Endowment
might either be
in the act of
appropriation,
or by a separate
instrument.

Appropriation
not dissolved,
when vicarage
dissolved.

General sum-
mary of the
law respecting
rectors and
vicars.

The endowment might either be in the act of appropriation, or by a separate act, and a separate instrument, so that in searching for an endowment, neither the act of endowment, nor the act of appropriation should be neglected; for though a separate act or instrument of endowment may not be found, yet it is possible the endowment may have been made in the act of appropriation. (1)

Where the vicarage was not endowed, the impropiator of the small tithes was bound to maintain a priest. (2)

It seems from *Parry v. Banks* (3), that an appropriation would not be dissolved where a vicarage is dissolved by the bishop and appropriated to the rectory; but the appropriation must, in such case, remain in a spiritual body. This, it is to be observed, was the case of an appropriation made since the statutes of Richard II. and Henry IV., and since the restraining statute of the 13th of Elizabeth. In the case of *Robinson (Clerk) v. Bedel* (4), the appropriation was made before the time of Richard II., and the dissolution before the 13th of Elizabeth.

The law respecting rectors and vicars is thus summarily stated in Blackstone's Commentaries by Stephen (5):—"Of parochial churches some have been appropriated, others have not: of the non-appropriated (called rectories) there is no vicar, but a rector only, who is of necessity a spiritual person, and has the cure of souls in the parish (6), with the exclusive title to all the emoluments: of the appropriated, there is generally, besides the rector or appropriator, a vicar; and in churches so circumstanced (termed vicarages) the appropriator is either ecclesiastical or lay, corporation aggregate or individual, as the case may be, but has never (as appropriator) the cure of souls within the parish; while the vicar, on the other hand, is always an individual and spiritual person, and is charged with the cure of souls. And as to the emoluments in vicarages, they belong in part to the appropriator, in part to the vicar, according to distinctions already in part referred to, but to be discussed more fully hereafter. To these explanations it may be proper to add, that in non-appropriated churches, the rector, in those which are appropriated, the vicar, is seised for his life only, the fee being in abeyance; but the appropriator may be seised in fee, or of a hereditament, according to the circumstances of his title.

"But it is not in all appropriations that a vicar exists; for in some it happens, in consequence of their being exempted (for particular reasons) from the statute of 4 Hen. 4. c. 12. (7), that no vicar has ever been endowed. Such churches, however, usually possess a permanent minister in holy orders, of the same general description, who, under the denomination of perpetual curate (8), is charged with the cure of souls, and entitled to emolument for his services; and where there is no perpetual curate, properly so called, the appropriator is bound from time to time to provide some person in holy

(1) *Ann. Styles*, 156.

(2) *Bonsay v. Lee*, 1 Vern. 247.

(3) *Cro. Jac* 518.

(4) *Cro. Eliz* 873.

(5) *Vol. iii* p. 75.

(6) By stat. 2 & 3 Vict. c. 30, reciting that there are several benefices in which more than one spiritual person has the general cure of souls, the bishop is em-

powered, where such is the case, to order an apportionment of the spiritual services.

(7) 1 Black Com. 394. *Watson's Clergyman's Law*, 172.

(8) As to perpetual curates, vide *In re Richardson v. Thomas*, 9 A. & E. 552. *Ellis v. Reynolds (Clerk)*, 2 M. & G. 71. Stat. 1 Geo. 1. st. ii. c. 10. ss. 4. & 21.

orders to perform the same duty, and to pay him a proper remuneration for his services. (1)

"It is to be observed also, as another anomaly in the law of vicarages, that in former times the rector of a benefice having cure of souls, sometimes obtained permission from superior authority, to appoint a vicar to officiate under him; so that by this means two persons were instituted to the same church, and both had cure of souls; the effect of which was, that by custom the rector became at length entirely relieved from residence, and from all other spiritual duties. An incumbent so circumstanced is commonly called a sinecure rector, or rector without cure of souls. But by stat. 3 & 4 Vict. c. 113. all ecclesiastical rectories without cure of souls in the sole patronage of the crown, or of any ecclesiastical corporation aggregate or sole, and having a vicar endowed or a perpetual curate, are immediately upon the future vacancies thereof respectively to be suppressed; and such as are in the patronage of any other person, the patronage of them may be at any time sold to the Ecclesiastical Commissioners, and upon the completion of such purchase the same shall respectively be suppressed (2); and the lands, tithes, and endowments thereof shall be vested in the Ecclesiastical Commissioners (3), and may be afterwards annexed, when it shall appear expedient, to the vicarage or perpetual curacy, which shall be thereupon constituted a rectory with cure of souls. (4) And moreover, that wherever any rectory theretofore deemed a rectory without cure of souls had been held, together with the vicarage dependent thereon, for the period of twenty years then last past, the same shall not be construed to be a rectory without cure of souls within the meaning of that act, but shall become permanently a rectory with cure of souls."

By stat. 1 & 2 Vict. c. 106. s. 35. "in all cases of rectories having vicarages endowed, or perpetual curacies, the residence of the vicar or perpetual curate in the rectory house of such benefice shall be deemed a legal residence to all intents and purposes whatever, provided that the house belonging to the vicarage or perpetual curacy be kept in proper repair to the satisfaction of the bishop of the diocese." And by the 61st section, "No oath shall be required of, or taken by, any vicar in relation to residence on his vicarage; any law, custom, constitution, or usage to the contrary notwithstanding." (5)

By stat. 3 Geo. 4. c. 72. s. 13. the Church Building Commissioners can convert any vicarage of any parish or place, or the separate divisions of any vicarage of any parish or place, divided under that act, or stat. 58 Geo. 3. c. 45. & stat. 59 Geo. 3. c. 134., into a rectory instead of a vicarage, in any case in which the owner entitled in fee simple to the rectory or tithes, if an inappropriate rectory, or the patron entitled in fee simple of a sinecure rectory, and also the incumbent of the sinecure rectory, of the parish or

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VICARAGES.

Stat. 1 & 2 Vict.
c. 106 s. 35.
& 61.

House of resi-
dence.

No oath to be
required of any
vicar in rela-
tion to resi-
dence.

CONVERSION OF
VICARAGES IN-
TO RECTORIES.

Stat. 3 Geo. 4.
c. 72 s. 13.

In cases in
which the rec-
toral tithes,
&c. shall be

(1) Vide stat. 1 & 2 Vict. c. 31. *Hine v. Reynolds*, 2 M & G 71. *Arthington v. Chester (Bishop of)*, 1 Hen. Black 429.

There were some cures which had chapels of ease belonging to them, and they who officiated in them were called capellani, and had their subsistence out of the oblations and obventions, and were often perpetual and presentative.

Where the incumbents had several chapels of ease, and only assistants to supply them, the canon law did not call them rectores but plebani, who had a sort of peculiar juris-

diction in lesser matters; but still they were under the bishop's authority in visitations and other ecclesiastical censures, because the care of the whole diocese belonged to him jure communi.

(2) S. 48.

(3) S. 54.

(4) S. 55.

(5) Vide stat. 29 Car. 2. c. 8, stat. 1 & 2 Gul. 4. c. 45., & stat. 4 & 5 Vict. c. 39. s. 26, relating to augmentations made by ecclesiastical persons to small vicarages.

VICARS AND
VICARAGES.

surrendered by
impropriators,
for the purpose
of converting
vicarages into
rectories, the
Church Build-
ing Commis-
sioners can
direct the
same to be done
accordingly.

place, if the same be not void at the time of such conversion, and the person (if any) entitled to the absolute interest in any lease granted of the sinecure rectory or glebe or tithes thereof, shall be willing to restore and release and reunite the tithes and glebe and all other rectorial rights, dues, and emoluments of the parish or place, or of any such proportion of the parish or place, as shall be satisfactory to the commissioners, to the incumbent of such parish or place, and his successors for ever; and such surrender, restoration, or release, is to be made in such form and by such instrument as the commissioners shall direct; and the commissioners are, by an instrument in writing under their seal, to direct such alteration to be made, and conversion of the vicarage into a rectory, from the period specified in such instrument, and upon the conditions as to the transfer, restoration, or reuniting of tithes, glebe, or other rectorial rights, dues, and emoluments therein mentioned; which instrument is to be registered in the registry of the diocese in which the parish shall be locally situate, and enrolled in the Court of Chancery; and such parish or place is to be deemed a rectory, without prejudice nevertheless to the rights and interests of any other persons; and the incumbent of any such vicarage is thereupon to be deemed to be the rector of such parish or divided parish, without any new induction or proceeding, and be entitled to exercise all such remedies for the recovery of tithes, glebe, and all other rectorial rights, dues, and emoluments, as rector of such parish or divided parish, as effectually as if such parish had been a rectory; and the commissioners can, before any such transfer and division can be finally completed, accept and confirm any such restoration or release and reunion of any such tithes, and accept and record the consents or engagements in relation thereto, of any such impropriator, patron, or sinecure rector and incumbent, (if there shall have been any incumbent to consent at the time of such conversion,) and tenant, if any, and proceed to the completing of any such transfer or division upon such consent, for the purpose of converting any such vicarage into a rectory or rectories, and all such consents will bind their heirs and successors, and executors and administrators respectively: but no incumbent is in any such case to become liable to the maintenance or upholding or repair of more than one house of residence in any such parish or place; and when in any such parish or place there shall be more than one house belonging to the church or chapels thereof, the bishop of the diocese is to decide and order which shall be deemed the house of residence, and be maintained as such; and the order of the bishop in relation thereto is to be registered in the registry of the diocese, and a duplicate copy of such order deposited and kept in the chest of the church or chapel of such parish or place.

Stat. 3 Geo. 4.
c. 72. s. 14
Sinecure rec-
tors may re-
lease part of
the rectorial
glebe, &c., and
retain the re-
mainder in fee
simple, for the
purpose of con-
verting any
age into a
y by the
is. sioners.

By stat. 3 Geo. 4. c. 72. s. 14., if the commissioners shall think proper to convert into a rectory the vicarage of any parish or place, or separate division of a parish or place which shall be divided, or in which a new church shall be erected under that act, or stat. 58 Geo. 3. c. 45., or stat. 59 Geo. 3. c. 134., and the possessor of the sinecure rectory of such parish or place for two or more lives, by virtue of a lease granted thereof by a rector with the consent of the patron and ordinary, shall desire to retain any manor or other hereditaments, being the glebe or part of the glebe of the rectory, and shall be willing to surrender and release his estate and interest in the tithes, and the residue (if any) of the glebe of the rectory, on condition that such manor and other hereditaments shall be vested in him, in fee

simple, then the commissioners can, with the consent of the patron of the rectory being entitled thereto in fee simple, and the incumbent thereof, by any instrument under the seal of the commissioners, and sealed and delivered by the patron and incumbent (if any), upon the execution by such possessor of the rectory, together with the patron and incumbent (if any) thereof, and the commissioners, of such instruments as are thereinbefore mentioned, for surrendering, releasing, and investing all the rectorial tithes and glebe (except the manor and other hereditaments to be retained as aforesaid), release and convey the manor and other hereditaments to such possessor, or such other person as he may direct; and such instruments are to be inrolled in the Court of Chancery, and upon the execution thereof the manor and other hereditaments comprised therein, with their appurtenances, and the fee simple and inheritance thereof, are to be absolutely vested in the person to whom the same shall be thereby released and conveyed, but subject to tithes in the same manner as if the same had never been part of the glebe of the rectory.

By stat. 1 & 2 Vict. c. 107. s. 16., after reciting that it may be expedient in certain cases, that a church or chapel should be constituted the parish church of the parish in which it is situate, in the stead of the ancient parish church, and that such ancient parish church should thenceforth become a district church or chapel of ease in such parish; enacts that the commissioners may, with the consent in writing of the bishop of the diocese and of the patron of the parish church, and with the consent also of the vestry or persons possessing the power of vestry, order and direct, by instrument under their common seal, that any church or chapel in any parish shall become and be and remain the parish church of such parish, in the stead of the ancient parish church; and the church or chapel so constituted the parish church is thenceforth to be the parish church of such parish, for all purposes and in relation to all rights, emoluments, endowments, dues, privileges, and all other matters and things, civil or ecclesiastical, theretofore belonging to the parish church, or patron or lay impropriator (if any thereof), as if the same had been always the parish church of such parish; and the commissioners can direct the transfer of the endowments, emoluments, or rights of or belonging to the old and existing church of such parish, or to the incumbent for the time being thereof, to any such church or chapel, and to the incumbent thereof for the time being, and his successors; and the trustees of any such ancient church, or of any rights, emoluments, and endowments of or belonging to any such church, or to the incumbent thereof for the time being, are required (and indemnified for so doing) to transfer all such rights, emoluments, and endowments, according to the direction of the commissioners, to such church or chapel so constituted the parish church, or to the incumbent thereof; and after such transfer all tithes or commutations for tithes, moduses, or other compositions for tithes, and all emoluments, dues, fees, offerings, oblations, and other profits and advantages, and all messuages, glebe, and other lands, tenements, or hereditaments, rents, sums of money, or real or personal chattels whatsoever, and all rights and privileges whatsoever and wheresoever, wherewith any such ancient church may be endowed, or to which the minister thereof then is or at any time theretofore was or ought to be entitled, are to become vested in the minister for the time being of the church or chapel so made the parish church and his successors for ever, in

VICARS AND
VICARAGES

Stat. 1 & 2 Vict.
c. 107. s. 16
Commissioners,
with consent of
bishops, &c.,
may make any
church or
chapel the
parish church
of any parish,
and the parish
church a dis-
trict church or
chapel of ease.

VICARS AND
VICARAGES.

as full and ample a manner as the minister of the ancient church might or could have received and enjoyed the same in case such substitution or transfer had not been made; and every such instrument of substitution and transfer is to be registered in the registry of the diocese, and enrolled in the Court of Chancery; and all acts of parliament, laws, and customs relating to the publishing banns of marriage, and celebration of marriages, christenings, churchings, and burials, and to all ecclesiastical fees, oblations, and offerings, are to apply to every such church or chapel so constituted the parish church, in like manner in every respect as to the former parish church of the parish; and such former parish church is to be deemed a district church, or a chapel with or without a district, as the commissioners shall direct: but no such instrument of substitution or transfer is to take effect till after the first avoidance of such ancient parish church, unless with the consent in writing of the actual incumbent thereof, in which case such incumbent will be and is declared to be to all intents and purposes the rector, vicar, or perpetual curate, as the case may be, of the church or chapel so constituted the parish church, instead of rector, vicar, or perpetual curate of the former parish church, without any presentation, institution, induction, collation, or other form of law being had, observed, or required; but the chancel (if any) of such former parish church is to continue to be repaired in such manner and by the same person or persons as were then by law or custom liable to the repairs thereof.

Stat. 2 & 3 Vict.
c. 49. s. 9.
Limitation of
the provisions
of stat. 1 & 2
Vict. c. 107.
enabling the
commissioners
for building
new churches,
with certain
consents, to
make any
church or
chapel the
parish church
of any parish,
and the parish
church a district
church or
chapel.

Stat. 1 & 2 Vict.
c. 107. s. 17.
Incumbent of
the former
parish church
to be incumbent
of the new.

Stat. 1 & 2 Vict.
c. 107. s. 18.
Provisions for
the ministers of
such churches.

By stat. 2 & 3 Vict. c. 49. s. 9. the powers granted by stat. 1 & 2 Vict. c. 107. to the Church Building Commissioners, of making, with certain consents, any church or chapel the parish church of the parish within which it is situate, instead of the ancient parish church, and of making such ancient parish church a district church or chapel, with or without a district, as they shall direct, are not to extend to the making of any church or chapel then or thereafter to be built and endowed under the powers of stat. 1 & 2 Vict. c. 107., or stat. 1 & 2 Gul. 4. c. 38., the parish church, or to the making any church or chapel the parish church, the advowson, right of presentation, or nomination of or to which shall belong to any other person than to the patron of such ancient parish church, without the consent in writing under the hands of the patron and of the incumbent or minister of any such church or chapel.

By stat. 1 & 2 Vict. c. 107. s. 17. the incumbent of such parish next succeeding after such substitution and transfer is to be the rector, vicar, or perpetual curate of such church so made the parish church; and the person who for the time being would have had a right of presenting, nominating, or appointing the incumbent to the former parish church, in case such transfer and substitution had not been made, is thenceforth, in lieu thereof, when any vacancy occurs, to have the like right of presenting, nominating, or appointing the incumbents of the church so made the parish church, as he would have had with respect to the former parish church.

By stat. 1 & 2 Vict. c. 107. s. 18. the Church Building Commissioners with the consent in writing of the bishop of the diocese, can make such provision under their common seal for the maintenance of the minister and clerk of the respective churches aforesaid, out of the pew rents of either of such churches, as shall seem expedient to them: but the rights of persons holding pews free of rent by faculty or prescription in any such former parish church are not to be affected.

VISITATIONS. (1)

1. ORIGIN OF VISITATIONS, p. 1376.

2. WHO TO MAKE, AND WHO SUBJECT TO VISITATIONS, p. 1376.

3. HOW OFTEN, AND IN WHAT ORDER, pp. 1376, 1377.

4. GENERAL CAPACITIES AND INCAPACITIES OF VISITORS, pp. 1377—1379.

When the manner of visitation, is not a ground for prohibition — Stat. 3 & 4 Vict. c. 113. ss. 47. & 68. — Chapters, or visitors upon their default, to propose alterations in their statutes — Special pecuniary arrangements with consent of bishop or chapter — Stat. 4 & 5 Vict. c. 39. s. 18. — Disposal of residence houses belonging to cathedrals, with consent of visitor.

5. CATHEDRALS VISITABLE BY THE ORDINARY, pp. 1379—1383.

6. TRIENNIAL VISITATIONS BY BISHOPS, pp. 1383, 1384.

Canon 60. — Ancient canon law of visitation was once a year — Origin of the present law and practice of triennial visitations — Inhibition during the time of visitation — Canon 125. — Convenient places to be chosen for the keeping of courts.

7. ARCHIDIACONAL VISITATIONS, pp. 1384—1392.

Stat. 4 & 5 Vict. c. 39. s. 28. — General powers of archdeacons — Constitutions of Langton, Otho, Reynolds, and Stratford — Canon 86. — Churches to be surveyed when not in repair — Refusal by a rector to preach the visitation sermon — Canon 137. — Clergy to exhibit letters of orders that the visitor may acquire a knowledge of his clergy — PRESENTMENTS — By whom to be made — Canon 113. — Canon 116. — To be made upon oath — Canon 119. — Convenient time to be assigned for framing presentments — Canon 115. — Ministers and churchwardens not to be sued for presenting — Presentments in what manner to be made — Canons 116 & 117. — Churchwardens not bound to present oftener than twice in the year — Canon 118. — At what time to be made — Canon 116. — Fee for taking in presentments. — Canon 26. — Penalty for not presenting — Archdeacons cannot at their pleasure direct churchwardens to present — Canon 121. — None to be cited twice for the same offence — Presentments to be certified — Churchwardens to support their presentments.

8. PROCURATIONS, pp. 1392—1396.

To whom procurations are due — Procurations anciently made by procuring provisions in specie — Constitutions of Langton, Othobon, and Stratford — Procurations how converted into money — The Crown pays for its appropriations, as the abbey did before the dissolution — Whether due when no visitation is made — To be sued for in the Spiritual Court — To be paid by rectories impropriate where there is no vicar endowed — Impropritate rectory where there is a vicar endowed — Chapel of ease under a parochial church — Churches newly erected — Places exempted.

(1) *Vide* tit. ARCHDEACONS — CHURCHWARDENS — CURATES — DEANS AND CHAPTERS — MANDAMUS — PRIVILEGES AND RESTRAINTS OF THE CLERGY — PROHIBITION.

Respecting royal visitations, *vide* stat. 25 Hen. 8. c. 21. & stat. 1 Eliz. c. 1. Stephens' Ecclesiastical Statutes, 160. 357. in *not*.

ORIGIN OF
VISITATIONS.

1. ORIGIN OF VISITATIONS.

For the government of the church and the correction of offences, visitations of parishes and dioceses were instituted in the ancient church, that good order might be preserved. (1)

WHO TO MAKE,
AND WHO SUB-
JECT TO VISITA-
TIONS.

2. WHO TO MAKE, AND WHO SUBJECT TO VISITATIONS.

For the first six hundred years after Christ, the bishops in their own persons visited "cunctas dioceses parochiasque suas singulis annis;" and they had seven deacons in every diocese to assist them. After that, they had authority in case of sickness, or other public concerns, to delegate priests or deacons to assist them; and thereupon, as it should seem, they canonised their great dioceses into archdeaconries, and gave the archdeacons commissions to visit and inquire, and to give them an account of all at the end of their visitations; and the bishops reserved the third year to themselves, to visit the churches, and to inform themselves, amongst other things, how the archdeacons, their substitutes, performed their duties. (2)

Every spiritual person is visitable by his ordinary.

Every spiritual person is visitable by the ordinary; so is a dean *de mero jure*, for he is spiritual. The ordinary has also power of correction of a person; and every hospital, be it lay or spiritual, is visitable; if it be lay, it is visitable by the patron, or by such as he has appointed by the endowment to be visitors; and if it be spiritual, it is visitable by the ordinary. (3)

When the patron or his appointee visits, his decision is final.

If a man visit as patron, or the patron's appointee, and no appeal against his decision be given by the deed of endowment, his decision is final; and though he deprive there is no appeal; but if he visit as ordinary, then there is an appeal to his superior. (4)

Diocese of London.

By agreement, the Archbishop of Canterbury never visits the diocese of London. (5)

Stat. 1 & 2
Vict. c. 108. s.
3. & stat. 2 & 3
Vict. c. 55.
s. 4.

Under stat. 6 & 7 Gul. 4. c. 77. portions of dioceses were transferred to new jurisdictions, and became portions of other dioceses; but by stats. 1 & 2 Vict. c. 108. s. 3., & 2 & 3 Vict. c. 55. s. 4. any bishop or archdeacon can hold visitations of the clergy within the limits of his diocese or archdeaconry, and at such visitations may admit churchwardens, receive presentments, and do all other acts, matters, and things by custom appertaining to the visitation of bishops and archdeacons in the places assigned to his jurisdiction or authority, and any bishop can consecrate a new church or chapel, or a new burial ground within his diocese, as assigned under stat. 1 & 2 Vict. c. 108.

HOW OFTEN,
AND IN WHAT
ORDER.

3. HOW OFTEN, AND IN WHAT ORDER.

By a constitution of Otho, archbishops and bishops are to go about their dioceses at fit seasons, correcting and reforming the churches, and consecrating and sowing the word of life in the Lord's field. (6)

(1) Godolphin's App. 7.

(2) Degge's P. C. by Ellis, 376.

(3) Godolphin's Repertorium, 34.

(4) *Philips v. Bury*, 2 T. R. 353.

(5) *Anon.* 3 Salk. 379.

(6) *Athon*, 56.

And regularly the order to be observed therein is this: in a diocesan visitation, the bishop is first to visit his cathedral church; afterwards the diocese; in a metropolitan visitation, the archbishop is first to visit his own church and diocese, then in every diocese to begin with the cathedral church, and proceed thence as he pleases to the other parts of the diocese: which appears from numerous instances in the ecclesiastical records as well of papal dispensations for the archbishop to visit without observing such order, as of episcopal licences for the visitor to begin in other parts of the diocese than the cathedral church. (1)

How often,
and in what
order.

And this sprang from the precept of the canon law, which requires that the archbishop, willing to visit his province, shall first visit the chapter of his own church and city and his own diocese; and after he has once visited all the dioceses of his province, he may (having first required the advice of his suffragans, and the same being settled before them, and put in writing that all may know thereof) again visit, according to the foregoing order, although his suffragans shall not assent thereto. And the like form of visiting observed by the archbishops is to be observed also by the bishops in their ordinary visitations. (2)

4. GENERAL CAPACITIES AND INCAPACITIES OF VISITORS.

GENERAL CAPACITIES AND INCAPACITIES OF VISITORS.

Free chapels and donatives, (unless such donatives have received the augmentation of Queen Anne's Bounty,) are exempt from the visitation of the ordinary; the former being visitable only by commission from the crown, and the latter by commission from the donor. And there are also other churches and chapels exempted, which belonged to the monasteries, having obtained exemptions from ordinary visitation, and being visitable only by the pope, and which by stat. 25 Hen. 8. c. 21. were made visitable by the king, or by commission under the great seal.

It may be here mentioned, that where the ordinary or metropolitan have a right to visit, the manner of the visitation is not so material, as to be a ground for prohibition, because any error or defect in the manner of the visitation may be remedied by appeal. (3)

When the manner of visitation is not a ground for prohibition.

It has also been decided, that even where a benefice is appropriated to a prior, or a dean and chapter, the bishop may visit, to see how the church is served, &c., and for contumacy may proceed to suspension. (4)

In *Rex v. Chester (Bishop of)* (5), the Court refused a mandamus to a visitor who had deprived a prebendary for incontinency, and to restore a canon whom he had expelled, or to reverse his own sentence; but, in this case, the bishop was by royal charter visitor of the cathedral. But a prohibition has been issued to a bishop, who claimed a right to present by lapse, under pretence of his visitatorial authority, to the office of a canon residentiary of his church, it being in all respects a freehold office.

In 1840 the Archbishop of York (6) held a visitation of the dean and

(1) Gilson's Codex, 957.

(2) Ibid.

(3) *Kilkare (Bishop of) v. Dublin (Archbishop of)*, in error, 2 Bro. P. C. 179

(4) *Harrison v. Dublin (Archbishop of)*, in error, ibid. 199.

(5) 1 Wils. 306. 1 Black. (Sir W.) 22

(6) *Vide ante*, 998.

GENERAL CAPACITIES AND INCAPACITIES OF VISITORS.

The Dean of York's case.

chapter of that cathedral church, and appointed a commissary for the purpose of carrying it into effect. Among the presentments made to the commissary was one which charged the dean with the sale of the livings in his ecclesiastical patronage. The dean denied the jurisdiction of the commissary to try the charge, and conducting himself with violence in court, was pronounced in contempt, from which he refused to purge himself during the trial. The commissary proceeded to try the charge in the visitatorial court, witnesses were examined *videlicet*, and their depositions taken down by the registrar. Finally, the commissary, in a very long and elaborate judgment, pronounced the dean guilty of simony, and to have incurred the penalty of deprivation on the two-fold ground of contumacious behaviour and simoniacal practices. The dean, after sentence, applied to the Court of Queen's Bench for a prohibition, which was granted; but every other proceeding in the visitation up to the time of trying the charge, was recognised by the Court as legal.

Stat. 3 & 4 Vict. c. 113. s. 47. Chapters, or visitors upon their default, to propose alterations in their statutes.

By stat. 3 & 4 Vict. c. 113. s. 47. the chapters of the several cathedral and collegiate churches are from time to time of their own accord, or upon being required by the visitors of those churches respectively, to propose to such visitors such alterations in the existing statutes and rules as shall provide for the disposal of the benefices in their patronage, so as to meet the just claims of the minor canons of such churches, and as shall make them consistent with the constitution and duties of the chapters respectively, as altered under the authority of the act; and all such alterations, if approved, may be confirmed by the authority of such visitor; and in any case in which such alterations are not approved, or in which such requisition is not complied with, within twelve calendar months after the making thereof, the visitor is at liberty of himself to make the necessary alterations; and all such statutes and rules when so altered are to be submitted to the Ecclesiastical Commissioners for England, and may be confirmed by the authority provided by the act; and as to any alteration made by a visitor alone, the commissioners are to communicate a draft thereof to the chapter to be affected thereby, and are, together with any scheme to be prepared by them under the authority contained in the act, to lay before her Majesty in council such remarks, as may within three months have been made thereon by such chapter; and out of the proceeds of the suspended canonries in any chapter, provision may from time to time be made by the authority provided in the act, for relieving the present canons of such chapter from the performance of any additional duty by reason of such suspension, by the employment of substitutes, to be approved by the respective bishops; but nothing in the act contained is to be construed to affect any existing right of chapters with their visitors to make statutes.

Stat 3 & 4 Vict. c. 113. s. 68. Special pecuniary arrangements with consent of bishop or chapter.

And by stat. 3 & 4 Vict. c. 113. s. 68. any sum of money which shall have been invested in the public funds, or in other security or securities, in trust for any chapter, may, upon an application in writing to the Ecclesiastical Commissioners for England, under the hand and seal of such chapter, and with the consent of the visitor thereof, be directed to be sold, and the same is to be sold accordingly, and the produce applied to such purpose as appears most conducive to the permanent benefit of the chapter.

Stat 4 & 5 Vict. c. 18. s. 18. of the

By stat. 4 & 5 Vict. c. 18. s. 18. the enactments of stat. 3 & 4 Vict. c. 113. s. 58. relating to the disposal of residence houses and houses attached to any dignity, prebend, or office in the precincts of the respective cathedral

and collegiate churches are repealed; and the dean and chapter of any cathedral or collegiate church, with the consent of their visitor, may from time to time sanction and confirm the exchange of houses of residence, or of houses attached to any dignities, offices, or prebends in the precincts of such church, among the canons of such church, or may make any such arrangement to take effect at any future time, or may assign any one of such houses being vacant to any canon willing to accept the same in lieu of the house theretofore occupied by him, and thereupon any house no longer required by any canon may be disposed of by the dean and chapter in such way as they shall deem fit, with the consent of their visitor and of the Ecclesiastical Commissioners for England, signified under their common seal; but all acts, matters, and things relating to any such house already done under the repealed provisions are made valid and effectual to all intents and purposes.

GENERAL CAPACITIES AND INCAPACITIES OF VISITORS.

houses belonging to cathedrals with consent of visitor.

5. CATHEDRALS VISITABLE BY THE ORDINARY.

That all deans and chapters are subject to the visitation of the bishop "jure ordinario," and of the archbishop of the province "jure metropolitico," is a well established maxim of ecclesiastical law. The exercise of such visitatorial power has been transmitted from the authority of the primitive church, incorporated into and inculcated by the canon law, and, wherever a question has arisen, supported by the temporal courts. Comyn, in his *Digest*, states, that "all spiritual persons generally are subject to the visitation of the bishop or other ordinary," and that "a dean of right is visitable by the ordinary." (1) The Council of Trent very carefully restored the old doctrine of the canon law upon this subject. (2) In the case of *Goodman (Dean of Wells)* (3) it appeared, that Edward VI. made Dr. Goodman dean of Wells; the Bishop of Bath and Wells held a visitation, through a civilian, Dr. Meyrick, his commissary, who deprived Goodman, on the ground that he held a stall in the cathedral of which he was dean. Queen Mary appointed delegates to revise this sentence, and they restored Goodman: in the succeeding reign of Elizabeth he was again deposed, and Turner, previously appointed by Edward VI., installed in the deanery. A question afterwards arose at common law, and a trial at bar took place in the county of Somerset, before a grand jury and four eminent judges of that day; they held that the deanery was a spiritual and not a temporal possession, and therefore visitable by the ordinary, and that Goodman had been justly deposed by Dr. Meyrick. The reporter adds this note to the case: "It was held that the dean was visitable by the bishop non obstante the saving in the act." Bishop Gibson gives another precedent in his appendix, where the dean and chapter of Exeter were visited by the archbishop of Canterbury, in Richard the Second's reign (4), the bishopric being vacant. In this case the visitor, being doubtful as to the titles by which some of the canons had obtained their offices, held a visitation, and in the meanwhile directed the revenues to be kept in safe custody. (5)

CATHEDRALS VISITABLE BY THE ORDINARY.

Visitable by the ordinary and metropolitan, and how.

(1) 6 Com. Dig. 566. tit. *Visitor* (A 6.).

(2) *Vide* sess. 6. c. 4. and sess. 25. c. 6.

(3) *Dyer*, 273.

(4) 1354.

(5) *Vide* Gibson's *Codex*, 133.

In Strype's *Life of Archbishop Parker*, (vol. i. pp. 144 148, ed. Oxon. 1821), will be found an account of a metropolitcal visitation of Canterbury by that Archbishop, and the articles of inquiry exhibited on the occa-

CATHEDRALS
VISITABLE BY
THE ORDINARY.

Dr. Phillimore (1) observes, "The records of the registry at York abound in precedents, among which may be remarked those of Archbishop Holgate, in 1552; of Frewin, in 1662; of Sterne, in 1667; of Sir W. Dawes, in 1715. Dr. Burwell, a civilian, acted as commissary to Holgate and Frewin. This last visitation (*i. e.* of Archbishop Dawes) arose from the appeal of a vicar choral to his grace, as visitor, from a sentence of the dean and chapter. The usual practice seemed to have been to appoint a commissary to hold the Court; but in this case the archbishop appears to have sat in person; but it is said, '*maturâ deliberatione prehabita de et cum consilio jurisperitorum—observatisque omnibus et singulis de jure in hac parte observanda.*' The sentence of the dean and chapter was confirmed by the archbishop, as it was afterwards by the Court of Delegates, to whom it was still further appealed. The late Archbishop of York (Harcourt) in order to allay certain dissensions, and remedy certain grievances in the cathedral of York, has exercised his visitatorial power '*jure ordinario*,' and after opening the court in person, appointed Dr. Phillimore his commissary or judge, to inquire into the alleged grievances, and adjudicate on the matters in dispute. (2)

"The manner of proceeding in a visitation of this description, is to issue inhibitions to all inferior jurisdictions, and a citation to the dean or residentiary canon, who cites all members of the cathedral body in an instrument embodying the citation of the ordinary; and on the return of the citations and the opening of the Court, to exhibit articles of inquiry, and, according to the answers given in and the discussions which take place upon them during the sitting of the Court, to issue injunctions, ordering all disorders of which the existence has been proved, to be rectified. The personal appearance of the members of the cathedral body and the execution of the injunctions may be enforced like any other process of an Ecclesiastical Court."

ARTICLES.

Articles of inquiry exhibited by ordinary in a visitation of his cathedral.

Performance of divine service.

Repairs of the fabric.

Bells, &c.

Lands and tenements.

The following is the form of articles of inquiry exhibited at the visitation of York, in January, 1841:—

1. *Imprimis*—Whether is divine service duly and reverentially performed in your church without alteration, addition, or diminution, according to the laws and statutes of the realm, and according to the canons of the Church and the rubric of the Book of Common Prayer by law established, and if not, who is in fault?

2. *Item*—What progress has been made in the repairs of the fabric of your church since the late calamitous fire? What is the amount of the sum belonging to the fabric which can be immediately appropriated to the repair of the same?

3. *Item*—Have any of the bells, lead, iron, or other materials which were damaged by the fires been sold; and if sold, for what sum? Have the proceeds arising from any such sale been applied to the reparation of the fabric, and if not, in whose hands does the custody of them remain?

4. *Item*—What lands and tenements have you belonging to the fabric

sion (1560). Accounts of like visitations of the same province by Archbishops Grindal (1576) and Whitgift (1583), may also be seen in Strype's *Lives of Archbishops Grindal* (pp. 313, 314., ed. Oxon 1821), and Whitgift (vol. 1 pp. 244, 410., ed. Oxon. 1822), *vide etiam* Strype's *Memorials of Archbishop Cranmer*, vol. 1. p. 229, Eccl.

Hist. Soc., ed 1848.

(1) 2 Burn's E. L. by Phillimore, 95. c)

(2) The practice seems to have varied as to appointing a civilian as commissary or as assessor. Bishop Gibson chose an assessor. Sometimes two commissaries have been appointed.

of your church, and what is the value of them, and what is the yearly reserved rent respectively? Declare your knowledge.

CATHEDRALS
VISITABLE BY
THE ORDINARY.

5. Item—What leases have been made of your fabric lands? And have the fines received from the same been duly expended on the fabric of the church, and to no other use, or are they reserved and kept in the manner prescribed in your statutes? Declare your knowledge herein, and whether all the monies and rents belonging to the fabric have been properly brought to account, and held by the chapter clerk for the use of the church.

Leases and
fines received.

6. Item—To what extent have the acts for the improvement in the minster yard, viz. stat. 54 Geo. 3. and stat. 6 Geo. 4., been carried into effect? What agreements have been entered into between the dean and chapter on behalf of the fabric and the dean, in furtherance of those acts? What was the nature of the agreement of the 22d July, 1828? Who were parties to that agreement, and by whom was that agreement signed? Are the acts for the improvement of the minster yard adequate to their object, and capable of being carried into full effect, or is it expedient and advisable that resort should again be had to the legislature to bring the affairs of the dean and chapter and the fabric to a complete and satisfactory arrangement?

Improvements
in minster
yard.

7. Item—Whether do you the dean and chapter make your capitular acts in your chapter house, and are they duly registered and observed? Is your common seal kept according to the statute in that case made and provided, and how do you audit the accounts of your rents and revenues?

Where capitular
acts made.

8. Item—Are all negotiations for renewals, agreements for leases, and all contracts for the purchase or alienation of property duly treated of and settled in chapter?

Where con-
tracts made.

9. Item—How and under what formalities and what safeguards are orders for work and agreements for expenditure made by you? And on what authority are your bills on the dean and chapter's and on the fabric accounts liquidated? Are all such accounts duly entered in a book, and regularly audited, and by whom are they audited?

Liquidation of
debts.

10. Item—Are the fines and rents of your common estates and of the fabric estates received by the chapter clerk? And are legal discharges given by him for the same?

By whom fines
and rents re-
ceived.

11. Item—Do you the dean and chapter duly hold your said chapters? Do you give sufficient notice beforehand of the holding of such chapters? Has there been any let or impediment interposed to the holding of chapters? Declare your knowledge?

Chapter meet-
ings.

12. Item—Has any exclusive power or paramount authority been claimed or exercised by the dean or any other of the residentiaries, either in the transaction of the business of the chapter, or over the members of the chapter?

Whether exclu-
sive authority
claimed by
dean.

13. Item—Is the library belonging to your said church carefully superintended and kept in good order? To whom is the custody of it confided? Have all the residentiaries and other members of the chapter free access to the same? And who have keys of the said library?

Superintend-
ence of library.

14. Item—Are the records and muniments belonging to the dean and chapter deposited in a convenient place, and preserved from dust and damp, kept in good order, and carefully and methodically arranged?

Preservation of
records.

15. Item—Have you the residentiaries duly kept residence for the term

Residence of

**CATHEDRALS
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the residentiaries.

Canonical houses.

Charitable uses and trusts.

Scholastic instruction.

Preservation of chancels.

Rota of preaching.

prescribed by the statute? If not, state the grounds on which such residence, or any portion of the term of such residence, has been omitted, whether it has been through sickness or any other urgent cause; and state whether during the period of such omission (if any such has occurred), any other member of the chapter has regularly attended the performance of divine service in the stead, and on the behalf, of the residentiary aforesaid.

16. Item — What change has of late years taken place with respect to the canonical houses, in what house or houses is the residence of the dean and canons respectively now kept? Does the dean always reside in the deanery, and does the residentiary always reside in a canonical house?

17. Item — Are you the dean and chapter feoffees in trust for any schools, hospital, or any other pious foundation? What manors, lands, or tenements belong to them and every of them respectively, and of what yearly value, what leases are there of the same, when and by whom, and for what term of years or lives granted? What fines on the last renewals of those leases were received, and by whom? How have they been employed, or in whose hands do they now remain? Are the houses and edifices thereto belonging kept in good repair?

18. Item — Are the children in the schools belonging to the dean and chapter diligently taught and instructed? Do the schoolmasters catechise the scholars, and instruct them otherwise in the principles of religion; and are the houses, lodgings, and buildings belonging to the said schools or school, duly used and employed according to the intention of their founders?

19. Item — Are the chancels of the churches and chapels belonging to the dean and chapter, and the other members of your body, in good and sufficient repair?

20. Item — Is the rota of preaching enjoined by Archbishop Holgate to the prebendaries and other dignitaries in your church, still in use and observance? If not, how has the arrangement of turns of preaching been altered? And in what way will the existing practice be affected by the existing statute 3 & 4 Vict. c. 113.

January 18th, A. D. 1841.

E. ELON.

Formerly there was no delegation of the bishop's jurisdiction.

In the Saxon times there was no delegation of the bishop's jurisdiction to the several officers of the bishop's courts; for the bishops presided in person in the county courts, and there heard ecclesiastical causes. (1)

But subsequently the exercise of the bishop's power was sometimes restrained by ancient compositions, as is seen in the two ancient ecclesiastical bodies of St. Paul's and Lichfield. Where the compositions are extant, both parties are equally bound to observe the conditions and limitations thereof. By the remissness and absence of the bishops of Lichfield from their see in going to Chester and then to Coventry, the deans had great power lodged in them as to ecclesiastical jurisdiction there: after long contests, the matter came, in the year 1428, to a composition, by which the bishops were to visit them but once in seven years, and the chapter had jurisdiction over their own peculiars. So in the church of Sarum, the dean had very large jurisdiction: probably therefore ancient; but upon contest it was settled by composition between the bishop and the dean and chapter in the year 1391. And when

(1) 1 Stilling. Ca. 212

there are no compositions, it depends upon custom, which limits the exercise, although it cannot deprive the bishop of his diocesan right. (1)

Several deans and chapters have had conferred upon them an ecclesiastical jurisdiction in several neighbouring parishes and deaneries; and they have also had the grant of a temporal jurisdiction over several manors.

CATHEDRALS
VISITABLE BY
THE ORDINARY.

6. TRIENNIAL VISITATIONS BY BISHOPS.

By canon 60., for the office of confirmation, it is enjoined (2), that the bishop shall perform that office in his visitation every third year; and if in that year, by reason of some infirmity, he be not able personally to visit, then he shall not omit the same the next year after, as he may conveniently.

The ancient canon law of visitation was once a year: *Decernimus, ut antiquæ consuetudinis ordo servetur, et annuis vicibus ab episcopo dioceses visitentur* (3); and, *Episcopum per cunctas dioceses, parochiasque suas, per singulos annos ire oportet*. (4) The same was the law of the English church. In the Council of Cloveshoe, anno 747, *Unusquisque episcopus parochiam suam pertranseundo et circumeundo, speculandoque, visitare non præsideat* [cesset] (5); and, afterwards, anno 787, *Unusquisque episcopus parochiam suam omni anno semel circumeat*. (6)

TRIENNIAL
VISITATIONS BY
BISHOPS.
Canon 60.

Ancient canon
law of visitation
was once a year.

But these and the like canons apply to parochial visitations, or a personal visitation repairing to every church; as appears, not only from the assignment of procurations, (originally in provisions and afterwards in money,) for the reception of the bishop; but also by the indulgence which the law grants in special cases, where every church cannot be conveniently repaired to: *Et si commodè vel absque difficultate accedere ad unamquamque non poterit, de pluribus locis ad unum congruum clericos et laicos studeat convocare, ne in illis visitatio postponatur*. (7) From this indulgence, and the great extent of dioceses beyond what they anciently were, grew the custom of citing clergy and people to attend visitations at particular places: the times of which visitations, as they are now usually fixed about Easter and Michaelmas, have evidently sprung from the two yearly synods of the clergy, which the canons of the church required to be held by every bishop about those two seasons, to consider of the state of the church and religion within the respective dioceses: an end that is also answered by the presentments that are there made concerning the manners of the people, as they used to be made to the bishop at his visitation of every particular church. But as to parochial visitation, or the inspection into the fabrics, mansions, utensils, and ornaments of the church, that care has been long devolved upon archdeacons; who, at their first institution in the ancient church, were only to attend the bishops at ordinations, and other public services in the cathedral; but being afterwards occasionally employed by them in the exercise of jurisdiction, not only the work of parochial visitation, but also the holding of general synods or

Origin of the
present law
and practice of
triennial visitations.

(1) Stilling. Ca. 241, 242.

(2) *Vide ante*, tit. CONFIRMATION.

(3) *CAUS.* 10. q. 1. c. 10.

(4) C. 11.

(5) *Spel.* V. 1. 246.

(6) *Ibid.* 293.

(7) *Sext. Decret.* 1. 3. t. 20. c. 1

TRIENNIAL
VISITATIONS BY
BISHOPS.

Inhibition
during the time
of visitation.

Canon 125.
Convenient
places to be
chosen for the
keeping of
courts.

visitations when the bishop did not visit, came by degrees to be known and established branches of the archidiaconal office, as such, which, by this means, attained to the dignity of ordinary, instead of delegated jurisdiction.

By these degrees came on the present law and practice of triennial visitations by bishops; so as the bishop is not only not obliged, by law, to visit annually, but (what is more) is restrained from it: which restraint being itself unreasonable, and having grown merely from the profits which attend the act of visiting, is thus moderated by the *Reformatio Legum* (1): "*Dioecesim totam tertio quoque anno visitet, et consuetas procuraciones accipiat; ut verò aliis temporibus, quoties visum fuerit, visitet, propter novos casus qui incidere possint, ei liberum esto; modò suis impensis id faciat, et nova onera stipendiorum aut procurationum ab ecclesiis non exigit.*"

But in the bishop's triennial, as also in visitations regal and metropolitical, all inferior jurisdictions, respectively, are inhibited from exercising jurisdiction during such visitation; and, in the time of Archbishop Winchelsey (2), a bishop was prosecuted, for exercising jurisdiction, before the relaxation of the inhibition; and, in Archbishop Tillotson's (3) time, a bishop was suspended for acting after the inhibition. And even matters begun in the Court of the inferior ordinary, whether contentious or voluntary, before the visitation of the superior, are to be carried on by the authority of such superior.

However, it has not been unusual, especially in metropolitical visitations, to indulge the bishops and inferior courts, in whole or in part, in the exercise of jurisdiction, pending the visitation. Thus relaxations were granted *pendente visitatione*, by Archbishop Abbot (4): others granted an unlimited leave or commission to exercise jurisdiction, or proceed in causes, notwithstanding the visitation; and others, a leave to confer orders, confirm, grant *fiats* for institution, institute or correct, while the inhibition otherwise continued unimpaired. (5)

After the relaxation of the inhibition, and especially in metropolitical visitations, not only reservations of power to rectify and punish the *comperta et detecta* were made, but also special commissions were issued for that object. (6)

By canon 125. "all chancellors, commissaries, archdeacons, officials, and all other, exercising ecclesiastical jurisdiction, shall appoint such meet places for the keeping of their courts by the assignment or approbation of the bishop of the diocese, as shall be convenient for entertainment of those that are to make their appearance there, and most indifferent for their travel; and likewise they shall keep and end their courts in such convenient time, as every man may return homewards in as due season as may be."

7. ARCHIDIACONAL VISITATIONS.

ARCHIDIACONAL
VISITATIONS.

Stat. 4 & 5 Vict. c. 39. s. 28., after reciting stat. 5 & 6 Gul. 4. c. 30. stat. 6 & 7 Gul. 4. c. 67., and stat. 2 & 3 Vict. c. 55., enacts that any bishop c. 39. s. 28.

- (1) 50. (a).
- (2) 154. (a).
- (3) 139. (a).
- (4) 1 Abb. 234 (a), 290. (b).
- (5) Arund. 407. (b). 2 Chich. 365.

Grind. 91, 92. 1 Whitg. 249. Tenk. 72 (a). Laud. 167. (a). Horn. Wint. 99. (b). (6) Cicestr. 2 (a). Arund. 407. (b). 2 Ibid. 93. (b, 2). (a). 2 Chich. 283 (b). 2 Abb. 242 (a). Laud. 223. (a).

or archdeacon may hold visitations of the clergy within the limits of his diocese or archdeaconry, and may at such visitations admit churchwardens, receive presentments, and do all other acts, matters, and things by custom appertaining to the visitations of bishops and archdeacons in the places assigned to their respective jurisdiction and authority, under or by virtue of the provisions of the first or secondly recited act; and that any bishop may consecrate any new church or chapel, or any new burial ground within his diocese.

Langton: "The archdeacons in their visitation shall see that the offices of the church be duly administered; and shall take an account in writing (1) of all the ornaments and utensils (2) of the churches, and also of the vestments and books; which they shall cause to be presented before them every year (3) for their inspection, that they may see (4) what have been added, or what have been lost." (5)

Otho: "Concerning archdeacons we do ordain, that they visit the churches profitably and faithfully, by inquiring of the sacred vessels and vestments, and how the service is performed, and generally of temporals and spirituals; and what they shall find to want correction, that they correct diligently. And when they visit, correct, or punish crimes, they shall not presume to take any thing of any one (save only moderate procurations), nor to give sentence against any persons unjustly, whereby to extort money from them. For whereas these and such like things do savour of simony, we decree, that they who do such things shall be compelled by the bishop to lay out twice as much for pious uses; saving, nevertheless, other canonical punishment against them. And they shall endeavour frequently to be present at the chapters (6) in every deanery, and therein instruct the clergy (amongst other things) to live well, and to have a sound knowledge and understanding in performing the divine offices." (7)

Reynolds: "We enjoin the archdeacons and their officials (8), that in the visitation of churches they have a diligent regard to the fabric of the church, and especially of the chancel, to see if they want repair; and if they find any defects of that kind, they shall limit a certain time under a penalty within which they shall be repaired. Also, they shall inquire by themselves, or their officials, in the parishes where they visit, if there be aught in things or persons which wanteth to be corrected; and if they shall find any such, they shall correct the same, either then or in the next chapter." (9)

Stratford: "Forasmuch as archdeacons and other ordinaries in their visitations, finding defects as well in the churches as in the ornaments

ARCHIDIACONAL VISITATIONS.

General powers of archdeacons.

Constitutions of Langton, Otho, Reynolds, and Stratford.

(1) *Account in writing*. — And it would be well to have the same indented; one part to remain with the archdeacon, and the other with the parishioners. Lyndwood, Prov. Const. Ang. 50.

(2) *Utensils*. — That is, which are fit or necessary for use; and by these are understood all the vessels of the church of every kind. Ibid.

(3) *Every year*. — That is, every year in which they shall visit. Ibid.

(4) *That they may see*. — Therefore the archdeacon ought to go to the place in person to visit, and not to send any other; which if he do, he shall not have the procurations (due upon the account of visiting)

in money; but otherwise, he whom he shall send shall receive procuration for himself and his attendants in victuals. Ibid.

(5) Ibid.

(6) *Chapters*. — That is, rural chapters. Athon, 54.

(7) Ibid. 52.

(8) Ibid. 54.

(9) *And their officials*. — It seems to be intimated, that the archdeacon's official may visit, which is not true, at least in his own right; yet he may do this in the right of the archdeacon, when the archdeacon himself is hindered. Lyndwood, Prov. Const. Ang. 53.

ARCHIDIACONAL VISITATIONS.

thereof, and the fences of the churchyard, and in the houses of the incumbents, do command them to be repaired under pecuniary penalties, and from those that obey not, do extort the said penalties by censures, wherewith the said defects ought to be repaired, and thereby enrich their own purses to the damage of the poor people: therefore, that there may be no occasion of complaint against the archdeacons and other ordinaries and their ministers, by reason of such penal exactions, and that it cometh not ecclesiastical persons to gape after, or enrich themselves with dishonest and penal acquisitions, we do ordain, that such penalties, so often as they shall be exacted, shall be converted to the use of such repairs, under pain of suspension *ab officio*, which they shall *ipso facto* incur until they shall effectually assign what was so received to the reparation of the said defects." (1)

Canon 86. Churches to be surveyed, and the decays certified to the high commissioners.

Canon 86. "Every dean, dean and chapter, archdeacon, and others, which have authority to hold ecclesiastical visitations by composition, law, or prescription, shall survey the churches of his or their jurisdiction once in every three years in his own person, or cause the same to be done; and shall from time to time, within the said three years, certify the high commissioners for causes ecclesiastical, every year, of such defects in any the said churches, as he or they do find to remain unrepaired, and the names and surnames of the parties faulty therein. Upon which certificate, we desire that the said high commissioners will *ex officio mero* send for such parties, and compel them to obey the just and lawful decrees of such ecclesiastical ordinaries, making such certificates." (2)

Refusal by a rector to preach the visitation sermon.

In the year 1626, Mr. Huntley, rector of Stourmouth, was required by Dr. Kingsley, archdeacon of Canterbury, to preach a visitation sermon, which he refused; and being cited before the High Commissioners, it was urged that he was bound to the performance of that office in pursuance of the archdeacon's mandate, by virtue of his oath of canonical obedience. He answered that he was not a licensed preacher according to the canons of 1603, and especially that he was not bound thereunto by his said oath, which implied only an obedience according to the canon law, as it is in force in this realm; and that there is no canon, foreign or domestic, which required him to do this; but, on the contrary, that the ancient canon law enjoined the visitor himself to preach at his own visitation. But the Court admonished him to comply; and, on his refusal, fined him 500*l.*, and imprisoned him till he should pay the same, and also make submission; and afterwards degraded and deprived him. (3)

But this, perhaps, may be one instance, amongst others, charged against that Court whilst it subsisted, of carrying matters with a pretty high hand. And Dr. Ayliffe remarks, from the Sixth Book of the Decretals, that amongst the orders to be observed by archbishops, bishops, and others in their visitations, the first is, that they ought to preach the word of God, by giving the congregation a sermon. (4)

Nevertheless, it is presumed, very few clergymen would refuse to discharge the offices of their function on the like occasion, at the request or intimation of their superior.

(1) Lyndwood, Prov. Const. Ang. 53.

(2) Since the making of these canons, the High Commission Court was abolished by stat. 16 Car. 1. c. 11.

(3) 4 Burn's E. L. 27.

(4) Ayliffe's Parergon Juris, 515.

Canon 137. "Forasmuch as the chief and principal cause and use of visitation is, that the bishop, archdeacon, or other assigned to visit, may get some knowledge of the state, sufficiency, and ability of the clergy, and other persons whom they are to visit, we think it convenient, that every parson, vicar, curate, schoolmaster, or other person licensed whosoever, do at the bishop's first visitation, or at the next visitation after his admission, show and exhibit unto him his letters of orders, institution, and induction, and all other his dispensations, licences, or faculties whatsoever, to be by the said bishop either allowed (1) or (if there be just cause) disallowed and rejected; and being by him approved, to be, (as the custom is) signed by the registrar: and that the whole fees (2) accustomed to be paid in the visitations in respect of the premises, be paid only once in the whole time of every bishop, and afterwards but half of the said accustomed fees (3) in every other visitation, during the said bishop's continuance."

Edmund: "There shall be in every deanery (4) two or three men, having God before their eyes, who shall, at the command of the archbishop or his official, present unto them the public excesses (5) of prelates and other clerks." (6)

As to the churchwardens' duty in this particular, although they have for many hundred years been a body corporate to take care of the goods, repairs, and ornaments of the church, as appears by the ancient register of writs, yet this work of presenting has been devolved on them and their assistants by canons and constitutions of a more modern date. Anciently, the way was to select a certain number, at the discretion of the ordinary, to give information upon oath, concerning the manners of the people; which number, the rule of the canon law upon this head evidently supposes to have been selected, while the synod was sitting, and the people, as well as clergy, in attendance there. *Episcopus in synodo residens, post congruam allocutionem, septem ex plebe ipsius parochiæ, vel eo amplius, prout viderit expedire, maturiores, honestiores, atque veraciores viros, in medium debet evocare.* But in process of time this method was changed, and it was directed in the citation that four, six, or eight, according to the proportion

ARCHIDIACONAL VISITATIONS

Canon 137. The whole fees for showing letters of orders and other licences, due but once in every bishop's time.

Presentments, by whom to be made.

(1) *To be by the said bishop allowed.* — None but the bishop, or other person exercising ecclesiastical authority by commission from him, have a right, *de jure communi*, to require these exhibits of the clergy; nor does the enacting part of this canon convey the right to any other; and therefore, if any archdeacons are entitled to require exhibits in their visitations, it must be upon the foot of custom, the beginning whereof has probably been an encroachment, since it is not likely that any bishop should give to the archdeacon and his official a power of allowing or disallowing such instruments, as have been granted by himself, or his predecessors. (Gibson's Codex, 95.)

(2) *Whole fees.* — In the registry of Archbishop Islip there is a sequestration of the benefices of divers clergymen refusing to make due exhibits in a visitation. *Ibid.* 1545.

(3) *And afterwards but half of the said accustomed fees.* — Lyndwood (Prov. Const. Ang. 225.) speaking of the letters of orders,

&c. to be exhibited by stipendiary curates going from one diocese to another, and entered in the matricula of the archdeacon, states — "*Unde in alius visitationibus, sive scrutationibus non oportet ipsorum litteras revideri nec ipsorum nomina iterum immatriculari, cum jam satis notum et cognitum sint. Et sic malè faciunt, qui in singulis visitationibus suis, pro inspectione litterarum ordinum, et earum approbatione, quicquam recipiunt; cum tunc immatriculatio fieri non debeat, nisi semel, scilicet in primò admissione, sicut hic patet.*"

(4) *In every deanery.* — That is, in every rural deanery. *Ibid.*

(5) *Public excesses.* — That is, notorious, whereof there is great and public infamy; and thus, although the same be not upon oath, but if such excesses shall not be notorious, then the same shall not be presented, unless there be proof upon oath. Lyndwood, Prov. Const. Ang. 227.

(6) *Ibid.*

ARCHIDIACONAL VISITATIONS.

of the district, should appear (together with the clergy) to represent the people, and to be the testes synodales.

But all this while we find nothing of churchwardens presenting; but the style of the books is, "Parochiani dicunt," "Laici dicunt," and the like, until a little before the Reformation, when the churchwardens began to present, either by themselves, or else with two, three, or more "parochiani fide digni," joined with them. And this last is evidently the origin of that office which our canons call the office of side-men or assistants. (1)

In the beginning of the reign of King James the First, a commissary had cited many persons of several parishes to appear before him at his visitation; and because they did not appear, they were excommunicated. But a prohibition was granted, because the ordinary had not power to cite any into that court, except the churchwardens and side-men. (2)

Canon 113.
Ministers may
present.

But by canon 113. "because it often cometh to pass, that churchwardens, side-men, questmen, and such other persons of the laity as are to take care for the suppressing of sin and wickedness, as much as in them lieth, by admonition, reprehension, and denunciation to their ordinaries, do forbear to discharge their duties therein, either through fear of their superiors, or through negligence, more than were fit, the licentiousness of these times considered; we do ordain, that hereafter every parson and vicar, or, in the lawful absence of any parson or vicar, then their curates and substitutes, may join in every presentment with the said churchwardens, side-men, and the rest above-mentioned, at the times hereafter limited, if they, the said churchwardens and the rest, will present such enormities as are apparent in the parish; or if they will not, then every such parson and vicar, or in their absence as aforesaid, their curates, may themselves present to their ordinaries at such times, and when else they think it meet, all such crimes as they have in charge, or otherwise, as by them (being the persons that should have the chief care for the suppressing of sin and impiety in their parishes) shall be thought to require due reformation: provided always, that if any man confess his secret and hidden sins to the minister, for the unburdening of his conscience, and to receive spiritual consolation and ease of mind from him, we do not any way bind the said minister by this our constitution, but do straitly charge and admonish him, that he do not at any time reveal and make known to any person whatsoever any crime or offence so committed to his trust and secrecy, (except they be such crimes as, by the laws of this realm, his own life may be called into question for concealing the same) under pain of irregularity."

Canon 116.

And by canon 116. it shall be lawful "for any godly disposed person, or for any ecclesiastical judge, upon knowledge or notice given unto him or them, of any enormous crime within his jurisdiction, to move the minister, churchwardens, or side-men, as they tender the glory of God and reformation of sin, to present the same, if they shall find sufficient cause to induce them thereunto, that it may be in due time punished and reformed; provided that for these voluntary presentments there be no fee required or taken of them."

To be made
upon oath.

Boniface: "We do decree, that laymen, when inquiry shall be made by the prelates and judges ecclesiastical for correcting the sins and excesses of

(1) Gibson's Codex, 960.

(2) Anon. Noy, 123.

those that are within their jurisdiction, shall be compelled (if need be) to take an oath to speak the truth." (1)

And that ordinaries are empowered by the laws of the church to require an oath of the testes synodales, appears not only from this constitution, but also from the body of the canon law. And the same practice of administering an oath appears in the ecclesiastical records of our own church, where it is often entered that the presentors were *onerati in conscientia* to discover whatever they knew to want amendment in *rebus et personis*. (2)

Oaths, on taking the office of churchwarden, are abolished, and a declaration substituted in their stead. (3)

Canon 119. "For the avoiding of such inconveniences as heretofore have happened, by the hasty making of bills of presentments upon the days of visitation and synods, it is ordered, that always hereafter every chancellor, archdeacon, commissary, and official, and every other person having ecclesiastical jurisdiction, at the ordinary time when the churchwardens are sworn, and the archbishop and bishops when he or they do summon their visitation, shall deliver or cause to be delivered to the churchwardens, quest-men, and side-men of every parish, or to some of them, such books of articles as they or any of them, shall require (for the year following), the said churchwardens, quest-men, and side-men to ground their presentments upon, at such times as they are to exhibit them. In which book shall be contained the form of the oath, which must be taken immediately before every such presentment; to the intent that, having beforehand time sufficient, not only to peruse and consider what their said oath shall be, but the articles also whereupon they are to ground their presentments, they may frame them at home (4), both advisedly and truly, to the discharge of their own consciences (after they are sworn) as becometh honest and godly men."

In consequence of disputes concerning the articles of inquiry, the convocation unsuccessfully attempted to frame one general body of articles for visitations. (5)

Canon 115. "Whereas for the reformation of criminous persons and disorders in every parish, the churchwardens, quest-men, side-men, and such other church officers are sworn, and the minister charged to present as well the crimes and disorders committed by the said criminous persons, as also the common fame which is spread abroad of them, whereby they are often maligned and sometimes troubled by the said delinquents, or their friends; we do admonish and exhort all judges, both ecclesiastical and temporal, as they regard and reverence the fearful judgment-seat of the highest judge, that they admit not in any of their courts any complaint, plea, suit, or suits, against any such churchwardens, quest-men, side-men, or other church officers, for making any such presentments, nor against any minister for any presentments that he shall make; all the said presentments tending to the

ARCHIDIACONAL VISITATIONS.

Canon 119. Convenient time to be assigned for framing presentments.

Canon 115. Ministers and churchwardens not to be sued for presenting.

(1) Lyndwood, Prov. Const. Ang. 109.

(2) Gibson's Codex, 960.

(3) Stat. 5 & 6 Gul. 4 c. 62, s. 9.

(4) *Frame them at home*. - By an entry in one of our records about 3 or 400 years ago, the ancient way of making presentments seems to have been the ordinary examination of the synodal witnesses, and the taking their depositions and presentments by word

of mouth, and then immediately entering them in the acts of the visitation. And although presentments are now required to be framed at home, there is no doubt but every visitor has the same right of personal examination that ancient visitors had, as often as he shall find occasion. Gibson's Codex, 962.

(5) Ibid.

ARCHIEPISCOPAL VISITATIONS.

restraint of shameless impiety; and considering that the rules both of charity and government do presume, that they did nothing therein of malice, but for the discharge of their consciences."

But there is more danger now than when these canons were made of actions being brought against churchwardens for presenting upon common fame, because the person accused in those days was required to answer upon oath to the charge laid against him, and to bring his compurgators; but the oath *ex officio* being now abolished, it does not seem safe to present any person upon common fame only without proof.

And even when the oath of purgation was in force, Mr. Clerke gave a caution that all, both churchwardens and others, should take care how they accused or presented any person for any crime or fame thereof, unless they could prove either the crime, or that the fame thereof arose from just causes and strong presumptions. Therefore, although the fame or rumour of any crime has been spread amongst many and good men, yet if it had its beginning from enemies or evil-minded persons, or (as is often the case) from the sole accusation of a woman confessing her own turpitude, the presentment or accusation in such case ought not to be general, but particular, that is, that such a fame or rather rumour was spread by such persons, or by the accusation or confession of such woman in childbirth, confessing her own baseness; and then, if the person accused proceed against the accuser in a cause of defamation, he shall fail in his suit if proof be made that there was such a fame or rumour as was set forth in the presentment. (1)

Presentments, in what manner to be made.

It is not enough to present that such a one hath committed fornication, or the like, but the person ought to be named with whom he committed the offence, with an allegation that there is a public fame thereof; otherwise, upon such a general and uncertain presentment, the person accused cannot know how to make his defence, and there may be cause of appeal. (2)

Canon 116. Churchwardens not bound to present oftener than twice a year.

Canon 116. "No churchwardens, quest-men, or side-men of any parish shall be enforced to exhibit their presentments to any having ecclesiastical jurisdiction, above once in every year where it hath been no oftener used, nor above twice in any diocese whatsoever, except it be at the bishop's visitation"... "provided always that, as good occasion shall require, it shall be lawful for every minister, churchwarden, and side-man to present offenders as often as they shall think meet,"... "and for these voluntary presentments no fee shall be taken."

Canon 117. Churchwardens not to be troubled for not presenting oftener than twice a year.

Canon 117. "No churchwardens, quest-men, or side-men shall be called or cited, but only at the said time or times before limited, to appear before any ecclesiastical judge whatsoever, for refusing at other times to present any faults committed in their parishes, and punishable by ecclesiastical laws. Neither shall they, nor any of them, after their presentments exhibited at any of those times, be any further troubled for the same, except upon manifest and evident proof it may appear, that they did then willingly and wittingly omit to present some such public crime or crimes as they knew to be committed, or could not be ignorant that there was then a public fame of them, or unless there be very just cause to call them for the explanation of their former presentments. In which case of wilful omission, their ordinaries shall proceed against them in such sort, as in causes of wilful perjury in a court ecclesiastical it is already by law provided."

(1) 1 Oughton, 236.

(2) Ibid. 229.

Canon 118. "The office of all churchwardens and side-men shall be reputed ever hereafter to continue until the new churchwardens that shall succeed them be sworn, which shall be the first week after Easter, or some week following, according to the direction of the ordinary. Which time so appointed shall always be one of the two times in every year, when the minister and churchwardens and side-men of every parish shall exhibit to their several ordinaries the presentments of such enormities as have happened in their parishes since their last presentments. And this duty they shall perform before the newly chosen churchwardens and side-men be sworn, and shall not be suffered to pass over the said presentments to those that are newly come into office, and are by intendment ignorant of such crimes: under pain of those censures which are appointed for the reformation of such dalliers and dispensers with their own consciences and oaths."

Canon 116. For the "presentments of every parish church or chapel, the registrar of any court, where they are to be exhibited, shall not receive in one year above 4*d*.; under pain, for every offence therein, of suspension from the execution of his office for the space of a month, toties quoties."

Besides being proceeded against by the censures of the church, it is enjoined by canon 26., that no minister shall in anywise admit to the receiving of the holy communion "any churchwarden or side-men who, having taken their oaths to present to their ordinaries all such public offences as they are particularly charged to inquire of in their several parishes, shall (notwithstanding their said oaths, and that their faithful discharge of them is the chief means whereby public sins and offences may be reformed and punished) wittingly and willingly, desperately and irreligiously, incur the horrible crime of perjury, either in neglecting or in refusing to present such of the said enormities and public offences, as they know themselves to be committed in their said parishes, or are notoriously offensive to the congregation there, although they be urged by some of their neighbours, or by their minister, or by their ordinary himself, to discharge their consciences by presenting of them, and not to incur so desperately the said horrible sin of perjury."

In *Selby's case* (1) a prohibition was prayed by a churchwarden to the Archdeacon of Exeter, because he proceeded to excommunicate him for having refused, after admonition, to present a notorious delinquent. And a prohibition was granted; because archdeacons cannot direct churchwardens to present at their pleasure; but if one churchwarden refuse to present, he may be presented by his successor.

Canon 121. "In places where the bishop and archdeacon do by prescription or composition visit at several times in one and the same year, lest for one and the self-same fault any of his majesty's subjects should be challenged and molested in divers ecclesiastical courts, we order and appoint that every archdeacon or his official, within one month after the visitation ended that year and the presentments received, shall certify under his hand and seal, to the bishop or his chancellor, the names and crimes of all such as are detected and presented in his said visitation, to the end the chancellor shall thenceforth forbear to convent any person for any crime or cause so detected or presented to the archdeacon. And the chancellor, within the like time after the bishop's visitation ended, and presentments

ARCHDEACONS
AND VISITA-
TIONS.

Canon 118.
The church-
wardens to
make their pre-
sentments be-
fore the new be
sworn.

Canon 116.
Fee for taking
in present-
ments.

Canon 26.
Penalty for not
presenting.

Archdeacons
cannot at their
pleasure direct
church-
wardens to
present.

Canon 121.
None to be
cited into se-
veral courts for
one crime.

(1) *Freem.* 298.

ARCHIDIACONAL VISITATIONS.

Presentments to be certified.

Churchwardens to support their presentments.

received, shall under his hand and seal signify to the archdeacon, or his official, the names and crimes of all such persons which shall be detected or presented unto him in that visitation, to the same intent as is aforesaid. And if these officers shall not certify each other, as is here prescribed, or after such certificate shall intermeddle with the crimes or persons detected and presented in each other's visitation, then every of them so offending shall be suspended from all exercise of his jurisdiction by the bishop of the diocese, until he shall repay the costs and expenses which the parties grieved have been at by that vexation."

Crimes clear and notorious, whether they be immoralities in persons, as lewdness, swearing, drunkenness, and such like; or defects in places, as the want of repairs, or of utensils in churches, churchyards, and parsonage houses; are not only in their nature merely spiritual and ecclesiastical, but in the chief heads thereof (as fornication, adultery, and the repairing of churches and churchyards), by the statute of *Circumspecte agatis* (13 Edw. 1.) not liable to prohibition. And therefore, if offenders, being presented, escape unpunished, it must be owing either to the want of proof, or to the want of prosecution. (1)

As to legal proof, in case the party presented denies the fact to be true, the making good the truth of the presentment, that is, the furnishing the Court with all proper evidences of it, undoubtedly rests upon the person presenting. And as the Spiritual Court in such cases is entitled by law to call upon churchwardens to support their presentments, so are churchwardens obliged not only by law (*Dr. Gibson says*) (2), but also in conscience, to see the presentment effectually supported; because to deny the Court those evidences which induced them to present upon oath, is to desert their presentment, and is little better, in point of conscience, than not to present at all, inasmuch as through their default the presentment is rendered ineffectual, as to all purposes of removing the scandal, or reforming the offender. And hence he takes occasion to wish, that the parishioners would think themselves bound (as on many accounts they certainly are bound) to support their churchwardens, in seeing that their presentments are rendered effectual. In any point which concerns the repairs or ornaments of churches, or the providing conveniences of any kind for the service of God, when such defects as these are presented, the spiritual judge enjoins the churchwardens presenting to see the defect made good, and supports him in repaying himself by a legal and reasonable rate upon the parish. But the support he intends on the part of the parishioners, is in the prosecution of such immoral and unchristian livers, as they find themselves obliged by their oath to present, as fornicators, adulterers, common swearers, drunkards, and such like, whose example is of pernicious consequence, and likely to bring many evils upon the parish.

PROCURATIONS.

To whom procurations are due.

8. PROCURATIONS.

Procuratio is due to the person visiting, *de jure communi*. The term itself is thus explained by the canonists: *Hoc munus ideo procuratio vocatur, quia ecclesiæ episcopum procurant, i. e. curant, alunt, ac tuentur; nec*

(1) *Gibson's Codex*, 966.

(2) *Ibid.*

pueri dicuntur procurari à nutricibus, et equus à domino, apud Plantum, et alios authores Latinos, qui propriè et emendatè locuti sunt; and the reason why it is due de jure communi, is set down in the Gloss upon the canon law (1): Cùm de jure communi debuerat visitare, de jure communi debet habere tunc procurationem; for, as the text of the canon law is, Nemo cogitur suis stipendiis militare. Accordingly, we find express decisions to this purpose, in the body of the canon law, where religious houses denied procurations, and alleged against the demand made by the visitor, that they did not find they had been paid to his predecessors, or demanded by them; whereupon the determination is as follows:—"Nos igitur præmissam allegationem eorum nullam penitus reputantes, cùm contra procurationem, quæ ratione visitationis debetur, præscribi nequiverit, quemadmodum nec contra visitationem ipsam potest aliquo modo præscribi; mandamus, quatenus sententiam quam in hujusmodi contemptores, de antiquâ metropolis consuetudine, tulit archiepiscopus [Senonensis], usque ad satisfactionem condignam facias observari." And we also find elsewhere, that notwithstanding an allegation, quòd ipsi procurationem hactenus non solverunt, the determination was, quatenus, nisi aliud rationabile ostenderint, vos eos ad exhibendum eam, sicut jus dictaverit, compellatis. (2)

In all visitations of parochial churches made by bishops and archdeacons, the law has provided that the charge thereof shall be answered by the procurations then due, and payable by the inferior clergy; wherein custom, as to the quantum, prevails. (3)

These procurations were anciently made by procuring victuals and other provisions in specie, concerning which the following constitutions have been ordained:—

Langton: "We forbid archdeacons, deans, and their officials, to make any exactions upon their clergy." (4)

Langton: "That archdeacons may not be burdensome to the churches subject unto them, we strictly enjoin that they do not exceed the number of horses and men prescribed by the general council (5); and that they do not presume to invite strangers with them to the procuration made for them on account of their visitation. But if the rectors of the churches, in honour of the archdeacon, will invite any, we do not forbid it. But the archdeacons themselves shall invite none, lest they who would not burden the churches by their own coming, should yet burden them by those whom they should invite. And that there may be no occasion to invite any, we do forbid the archdeacons to hold any chapter on the day of visitation at the church which they visit, unless it be in a borough or city. And we enjoin the archdeacons, that they do not in anywise (6) receive procuration without reasonable cause, but only on the day when they personally visit (7) the

PROCURATIONS.

Procurations anciently made by procuring provisions in specie.
Constitutions of Langton, Othobon, and Stratford.

(1) Extra. l. 2. t. 26. c. 16. v. *Consuet.*

(2) Ibid. l. 1. t. 39. c. 24

(3) Godolphin's Introd. 19.

(4) Lyndwood, Prov. Const. Ang. 221.

(5) *Prescribed by the general council*—That is to say, five or six, but herein a regard ought to be had to the custom of the country or place. Ibid. 220

(6) *In anywise*—That is, either in

victuals, money, or any thing in lieu thereof. Ibid.

(7) *Personally visit*—But yet, if through infirmity or any other lawful cause, the archdeacon be hindered from visiting in person, he may exercise the office by another; and in such case the procurations shall be paid. Ibid. 221

PROCURATIONS. church; and that they do not extort money from the church as a fee or ransom for not visiting." (1)

Othobon: "The archdeacons shall not burden the churches with superfluous expenses, but only require moderate procurations when they visit; and shall not bring strangers with them, but demean themselves modestly, both in regard to their attendants and their horses." (2)

Othobon: "The church visited, ought in reason to entertain the visitor; but where no visitation is, there shall be no procuration; and if any person shall take any thing, he shall be suspended from the entrance of the church until he make restitution. And the bishops and other inferior prelates, when they visit, shall not burden the clergy with a superfluous number of attendants or horses, or otherwise, in expenses; and if they do, the clergy shall not obey them in that behalf; and any sentences of excommunication, suspension, or interdict, on occasion thereof, shall be void." (3)

Stratford: "No procuration shall be due without actually visiting, and if any shall visit more churches than one in one day, he shall have but one procuration, to be proportioned amongst the said churches. And because sometimes the retinue of a visitor exceedeth the number of men and horses appointed by the canons, so that they who pay their procurations in victuals are excessively burdened beyond the rate which is usually paid in money, it shall be in the choice of the visited to pay the same in money or in provisions." (4)

Procurations
how converted
into money.

And this last constitution, by putting it in the choice of the incumbent whether he would entertain the visitor in provisions, or compound for them by a certain sum of money, was the cause of the custom generally prevailing afterwards, and which now universally exists, of a fixed payment in money, instead of a procuration in meat, drink, provender, and other accommodation.

The Crown
pays for its
appropriations
as the abbey
did before the
dissolution.

These proxies are now part of the settled revenue of the bishop's see; the king himself pays them for his appropriations, as the abbey did before the dissolution, when they had appropriated churches. In *Rex v. Ford* (*Sir Ambrose*) (5) it was held,—First, that as the service of the tenant in repairing a castle, having been commuted into a money rent, is payable though the castle is demolished (6); so for the same reason, though benefices impropriate become a lay fee, and being in lay hands are not visitable, and though religious houses are suppressed, still the ascertained sum given as and retaining the name of procurations, and by ancient composition made parcel of the settled revenues of a bishop, shall remain for ever without being subject to extinguishment. Nor shall their origin be examined or brought into question, more than that of pensions or portions of tithes arising out of many abbey and impropriate rectories.—Secondly, that procurations being in their original nature, duties payable for visitation, were grantable to the king as head of the church, who might take the same, specially because the said duties were converted into a sum certain in the nature of a pension; and that being so grantable to the king, a bishop might so grant the same, being part of his see (7)—and thirdly, that the unity of

(1) Lyndwood, Prov. Const. Ang. 219.

(2) Athon, 53.

(3) Ibid. 114.

(4) Lyndwood, Prov. Const. Ang. 223.

(5) *Davis* (Sir J.), 1.

(6) *Sir William Capel's case*, cited 4 Co. 88 (a).

(7) *See vide stat.* 19 Eliz. c. 10. s. 3.

possession of procurations with the impropriate rectories by the religious houses out of which the procurations are payable, does not extinguish the latter in the hands of the king, but suspends the payment thereof for the time, till the king, by his grant, severs one from the other; and this is assimilated to the case of tithes. For as tithes are due to lay persons who have purchased impropriate rectories, though they give no instruction (which was the origin of tithes), so proxies are due to ordinaries out of the impropriations of the dissolved religious houses, though their visitation has ceased. (1)

Although procuration was originally due by reason of visitation only, yet it may be due without actual visitation. The foregoing constitutions limit the payment, whether in provisions or money, to actual visitation, and warrant the denial of it when no visitation is held: upon which a doubt has been raised, whether those archdeacons, who are not permitted to visit, but are inhibited from doing it in the bishop's triennial visitation, have a right to require procurations for that year. They who have maintained the negative, rely for their opinion upon the express letter both of the ancient canon law, and of our own provincial constitutions. But others, who defend the rights of the archdeacons, allege, that though it might be reasonable that they lose their procurations, in case they neglect their office of visiting (which, in fact, was all that the ancient constitutions meant), yet that reason does not hold, when they are restrained and inhibited from it; and that procurations are rated in the valuation of King Henry VIII., as part of the revenues of every archdeacon, who therefore pays a certain annual tenth for them; and the law could never intend the payment of the tenth part every year, if there had been any year in which he was not to receive the nine parts: and these two arguments (Dr. Gibson says) are so strong in favour of the archidiaconal rights, the first in reason, and the second in law as well as reason, that no more need be said upon that head. (2)

Procurations can only be sued for in the Spiritual Court, and are merely an ecclesiastical duty (3); and may be levied by sequestration or other ecclesiastical process. (4)

In *Saunderson v. Clagget* (5), Dr. Clagget, archdeacon of Sudbury, commenced a suit in the Consistory Court of the Bishop of Norwich, against Saunderson, as proprietor or curate of the impropriate rectory of Aspal, in Suffolk, for the annual sum of 6s. 8d. as a procuration or proxy due to the archdeacon for visitations. Saunderson moved the Court of King's Bench for a prohibition, and suggested that this rectory of Aspal was time out of mind a rectory impropriate, without any vicar endowed; and that all the tithes and profits within this rectory time out of mind belonged to the proprietor thereof, who at his own expense used to provide a curate to celebrate divine service at the parish church of Aspal. But it was denied by the whole court, who delivered their opinions *seriatim*: 1. That this was an ecclesiastical duty, and therefore properly suable for in the Spiritual Court. 2. That it was claimed both by and from an ecclesiastical person, which

PROCURATIONS.

Whether due when no visitation is made.

To be sued for in the Spiritual Court.

To be paid by rectories impropriate where there is no vicar endowed.

(1) 4 Burn's E. L. by Phillimore, 36.

(2) Gibson's Codex, 975.

(3) *St. David's (Bishop of) v. Lucy*, 1 Ld. Raym. 450.

(4) Gibson's Codex, 1546.

(5) 1 P. Wms. 657. 1 Str. 421.

PROCURATIONS.

made it the stronger. 3. That though there was an impropriation in the case, still there must be a curate to take care of the souls of the parishioners, and that curates as well as other persons must stand in need of bishop's or archdeacon's instruction and visitations. Consequently, 4. That the ordinary or archdeacon ought to be allowed for his procuration what had been usually paid for it, which here appeared to be 6s. 8d. 5. That where a thing is claimed by custom in the Spiritual Court, it must be intended according to their construction of a custom; and by their law, forty years make a custom or prescription. 6. That the payment of 6s. 8d. for seventy or eighty years was an evidence of an immemorial payment; but if it could not be strictly immemorial as taking the archdeaconry to have been founded in Edward the 6th's time, still, since that period, it might become due by endowment, which might in this distance of time have been lost.

Impropriate
rectory where
there is a vicar
endowed.

If there be a parsonage and a vicarage endowed, only one is to pay procurations; but which of them must pay is to be directed by custom, or the endowment, if extant. (1)

Chapel of ease
under a paro-
chial church.

A chapel of ease is to be included in the procuration of the mother church. (2)

Churches
newly erected.

Churches newly erected are to be rated to procurations according to the portion paid by the neighbouring churches. (3)

Places exempt-
ed.

Donatives and free chapels pay no procurations to any ecclesiastical ordinary, because they are not within the visitation of the ordinary. (4)

(1) Degge's P. C. by Ellis, 368.

(3) Gibson's Codex, 975, 976.

(2) Lyndwood, Prov. Const. Ang. 223.
Degge's P. C. by Ellis, 368.

(4) Degge's P. C. by Ellis, 368.

A D D E N D A.

Page 146. after line 9, insert

In *Reg. v. Canterbury (Archbishop of)*, (M. S. Q. B., H. T. 1848,) the question was discussed whether, under stat. 20 Hen. 8. c. 25., archbishops confirm the elections of bishops judicially, or only ministerially; when Mr. Justice Erle, Mr. Justice Coleridge, Mr. Justice Patteson, and Lord Denman delivered the following judgments:—

MR. JUSTICE ERLE. — “A rule for a mandamus to the archbishop of Canterbury, to hear and decide on the objections of the applicants to the confirmation of the election of Dr. Hampden to the bishopric of Hereford, upon the ground of the unsoundness of some theological opinions published by him, has been moved for. In support of the application it has been contended that the archbishop, when confirming the election of a bishop in obedience to stat. 25 Hen. 8. c. 20. (1), is bound to try judi-

Denman.

*Judgment of
Mr. Justice
Erle in Reg. v.
Canterbury
(Archbishop
of).*

(1) Stat. 25 Hen. 8. c. 20. (An Act for the non-payment of first-fruits to the Bishop of Rome) s. 1. “Where sithen the beginning of this present parliament, for repress of the exaction of annates and first-fruits of archbishoprics and bishoprics of this realm, wrongfully taken by the Bishop of Rome, otherwise called the pope, and the see of Rome, it is ordained and established by an act, among other things, that the payments of the annates or first-fruits, and all manner of contributions for the same, for any such archbishopric or bishopric, or for any bulls to be obtained from the see of Rome, to or for the said purpose or intent, should utterly cease, and no such to be paid for any archbishopric or bishopric within this realm, otherwise than in the same act is expressed; and that no manner of person or persons to be named, elected, presented, or postulated to any archbishopric or bishopric within this realm, should pay the said annates or first-fruits, nor any other manner of sum or sums of money, pensions, or annuities for the same, or for any other like exaction or cause, upon pain to forfeit to our sovereign lord the king, his heirs and successors, all manner his goods and chattels for ever, and all the temporal lands and possessions of the said archbishopric or bishopric during the time that he or they that should offend contrary to the said act, should have, possess, and enjoy the said archbishopric or bishopric. And it is further enacted, that if any person named or presented to the see of

Rome by the king's highness, or his heirs or successors, to be bishop of any see or diocese within this realm, should happen to be letted, delayed, or deferred, at the see of Rome from any such bishopric whereunto he should be so presented, by mean of restraint or bulls of the said Bishop of Rome, otherwise called the pope, and other things requisite to the same, or should be denied at the see of Rome, upon convenient suit made, for any bulls requisite for any such cause, that then every person so presented might or should be consecrated here in England by the archbishop in whose province the said bishopric shall be; so always, that the same person should be named and presented by the king for the time being to the said archbishop. And if any person being named and presented (as is aforesaid) to any archbishopric of this realm, making convenient suit, as is aforesaid, should happen to be letted, delayed, deferred, or otherwise disturbed from the said archbishopric, for lack of pall, bulls, or other things to him requisite to be obtained at the see of Rome, that then every such person so named and presented to the archbishop, might and should be consecrated and invested, after presentation made, as is aforesaid, by any other two bishops within this realm, whom the king's highness or any his heirs or successors, kings of England, would appoint and assign for the same, according and after like manner as divers archbishops and bishops have been heretofore in ancient time by sundry the

BISHOPS.

Judgment of
Mr. Justice
Erle in *Reg. v.
Canterbury
(Archbishop
of)*.

cially the validity of the election; and that persons present at the time of confirming have a right to state to him their objections to the person

king's most noble progenitors made, consecrated, and invested within this realm. And it is further enacted by the said act, that every archbishop and bishop, being named and presented by the king's highness, his heirs and successors, kings of England, and being consecrated and invested, as is aforesaid, should be installed accordingly, and should be accepted, taken and reputed, used and obeyed, as an archbishop or bishop of the dignity, see, or place whereunto he shall be so named, presented, and consecrated, and as other like prelates of that province, see, or diocese, have been used, accepted, taken, and obeyed, which have had and obtained completely their bulls and other things requisite in that behalf from the see of Rome, and also should fully and entirely have and enjoy all the spiritualities and temporalities of the said archbishopric or bishopric, in as large, ample, and beneficial manner, as any of his or their predecessors had or enjoyed in the said archbishopric or bishopric, satisfying and yielding unto the king's highness, and to his heirs and successors, all such duties, rights, and invests as before time hath been accustomed to be paid for any such archbishopric or bishopric, according to the ancient laws and customs of this realm and the king's prerogative royal, as in the said act amongst other things is more at large mentioned.

2. "And albeit the said Bishop of Rome, otherwise called the pope, hath been informed and certified of the effectual contents of the said act, to the intent that by some gentle ways the said exactions might have been redressed and reformed, yet nevertheless the said Bishop of Rome hitherto hath made none answer of his mind therein to the king's highness, nor devised nor required any reasonable ways to and with our said sovereign lord for the same: wherefore his most royal majesty, of his most excellent goodness, for the wealth and profit of this his realm and subjects of the same, hath not only put his most gracious and royal assent to the foresaid act, but also hath ratified and confirmed the same, and every clause and article therein contained, as by his letters patents, under his great seal enrolled in the Parliament Roll of this present parliament, more at large is contained.

3. "And forasmuch as in the said act it is not plainly and certainly expressed, in what manner and fashion archbishops and bishops shall be elected, presented, invested, and consecrated within this realm, and in all other the king's dominions, be it now therefore enacted by the king our sovereign lord, by the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, that the said act and everything therein contained shall be and stand

in strength, virtue, and effect, except only, that no person or persons hereafter shall be presented, nominated, or commended to the said Bishop of Rome, otherwise called the pope, or to the see of Rome, to or for the dignity or office of any archbishop or bishop within this realm, or in any other the king's dominions, nor shall send nor procure therefor any manner of bulls, breeves, palls, or other things requisite for an archbishop or bishop, nor shall pay any sums of money for annates, first-fruits, nor otherwise for expedition of any such bulls, breeves, or palls; but that by the authority of this act such presenting, nominating, or commending to the said Bishop of Rome, or to the see of Rome, that such bulls, breeves, palls, annates, first-fruits, and every other sum of money heretofore limited, accustomed, or used to be paid at the said see of Rome, for procuration or expedition of any such bulls, breeves, or palls, or other things concerning the same, shall utterly cease and no longer be used within this realm or within any the king's dominions, anything contained in the said act aforesaid, or any use, custom, or prescription to the contrary thereof notwithstanding.

4. "And furthermore, be it ordained and established, by the authority aforesaid, that at every avoidance of every archbishopric or bishopric within this realm, or in any other the king's dominions, the king our sovereign lord, his heirs and successors, may grant to the prior and convent, or the dean and chapter of the cathedral churches or monasteries where the see of such archbishopric or bishopric shall happen to be void, a licence under the great seal, as of old time hath been accustomed to be granted to election of an archbishop or bishop, the see so being void, with a letter missive, containing the name of the person which they shall elect and choose, by virtue of which licence the said dean and chapter, or prior and convent, to whom any such licence and letters missive shall be directed, shall with all speed and celerity do perform elect and choose the same person named in the said letters missive, to the dignity and office of the archbishopric or bishopric so being void, and there after. And if they do defer or delay their election above twelve days next after such licence or letters missive to them delivered, that two for every such default the king's highness, his heirs and successors, at the king's pleasure, shall nominate and present, by their letters patents under their great seal, such a person to the said office and dignity so being void, as they shall think fit and convenient for the same, and that every such nomination and presentation to be made by the king's highness, his heirs and successors, if it be to the office and dignity of a bishop, shall be made by the bishop and metropolitan of the province where the

elected, and to demand his judgment thereon, and that this right may be enforced by mandamus in case of a refusal to hear. To this it has been

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see of the same bishopric is void, if the see of the said archbishopric be then full, and not void; and if it be void, then to be made to such archbishop or metropolitan within this realm, or in any of the king's dominions, as shall please the king's highness, his heirs or successors; and if any such nomination or presentment, shall happen to be made for default of such election to the dignity or office of any archbishop, then the king's highness, his heirs and successors, by his letters patents under his great seal, shall nominate and present such person as they will dispose to have the said office and dignity of archbishopric being void, to one such archbishop and two such bishops, or else to four such bishops within this realm or in any of the king's dominions, as shall be assigned by our said sovereign lord, his heirs or successors.

5. " And be it enacted, by the authority aforesaid, that whosoever any such presentment or nomination shall be made by the king's highness, his heirs or successors, by virtue and authority of this act, and according to the tenor of the same, that then every archbishop and bishop, to whose hands any such presentment and nomination shall be directed, shall with all speed and celerity invest and consecrate the person nominate and presented by the king's highness, his heirs and successors, to the office and dignity that such person shall be so presented unto, and give and use to him pall, and all other benedictions, ceremonies and things requisite for the same, without suing, procuring, or obtaining hereafter any bulls or other things at the see of Rome, for any such office or dignity in any behalf. And if the said dean and chapter, or prior and convent, after such licence and letters missive to them directed, within the said twelve days do elect and choose the said person mentioned in the said letters missive, according to the request of the king's highness, his heirs or successors, thereof to be made by the said letters missive in that behalf, then their election shall stand good and effectual to all intents and that the person so elected, after certification made of the same election, under the common and convent seal of the electors, to the king's highness, his heirs or successors, shall be reputed and taken by the name of lord elected of the said dignity and office that he shall be elected unto, and then making such oath and fealty only to the king's majesty, his heirs and successors, as shall be appointed for the same, the king's highness by his

letters patents under his great seal, shall signify the said election, if it be to the dignity of a bishop, to the archbishop and metropolitan of the province where the see of the said bishopric was void, if the see of the said archbishop be full and not void; and if it be void, then to any other archbishop within this realm, or in any other the king's dominions; requiring and commanding such archbishop, to whom any such signification shall be made, to confirm the said election, and to invest and consecrate the said person so elected to the office and dignity that he is elected unto, and to give and use to him all such benedictions, ceremonies, and other things requisite for the same, without any suing, procuring, or obtaining any bulls, letters, or other things from the see of Rome for the same in any behalf. And if the person be elected to the office and dignity of an archbishop according to the tenor of this act, then after such election certified to the king's highness, in form aforesaid, the same person so elected to the office and dignity of an archbishop, shall be reputed and taken lord elect to the said office and dignity of an archbishop, whereunto he shall be so elected; and then after he hath made such oath and fealty only to the king's majesty, his heirs and successors, as shall be limited for the same, the king's highness, by his letters patent under his great seal, shall signify the said election to one archbishop and to other bishops, or else to four bishops within this realm, or within any other the king's dominions, to be assigned by the king's highness, his heirs or successors, requiring and commanding the said archbishop and bishops with all speed and celerity, to confirm the said election, and to invest and consecrate the said person so elected to the office and dignity that he is elected unto, and to give and use to him such pall, benedictions, ceremonies, and all other things requisite for the same, without suing, procuring, or obtaining any bulls, briefs, or other things at the said see of Rome, or by the authority thereof in any behalf.

6. " And be it further enacted by authority aforesaid, that every person and persons being hereafter chosen, elected, nominate, presented, invested, and consecrated to the dignity or office of any archbishop or bishop within this realm, or within any other the king's dominions, according to the form, tenor, and effect of this present act, and using their temporalities out of the king's hands, his heirs, or successors, as hath been accustomed,

* The author has recently examined the original roll of this statute, and the words "TO CONFIRM THE SAID ELECTION AND" in sect. 5, and the word "CONFIRM" in sect. 7 of this statute, are inserted by interpolation, having been introduced by amend-

ment after the bill was engrossed, a fact which affords ground for contending, that the legislature attached importance to the act of confirmation, and therefore did not regard it as one of a mere ministerial character.

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answered, that the provisions of the statute are in direct contradiction to the right contended for.

"The question, therefore, turns upon the effect of the statute.

"The preamble of the third section recites that the manner and fashion of electing, presenting, investing, and consecrating bishops had not been plainly and certainly expressed in stat. 23 Hen. 8. and for remedy enacts, by sect. 4, that the dean and chapter shall elect the person named in the letters missive of the king, within twelve days; and in case of their default, that the king may nominate and present to the archbishop, such person as the king shall think able and convenient for the vacant bishopric. And by sect. 5, first, that in case of such nomination and presentment, the archbishop shall with all speed invest and consecrate, without any recourse to Rome; and, secondly, that in case the dean and chapter shall elect the person named in the letters missive, their election shall stand good and effectual to all intents, and the person so elected, after certification to the king, shall be reputed and taken by the name of lord elected of the bishopric. Then the oath and fealty appointed for the same being made to the king by the person so elected, the king shall signify the said election to the archbishop, commanding and requiring him to confirm the said election, and to invest and consecrate the person so elected. And by sect. 7, if any archbishop after any such election or nomination shall be signified, shall refuse, and do not confirm and consecrate the person so elected or nominated, within twenty days, or if any person shall admit any process to the contrary of the due execution of this act, such person shall incur the penalties of a præmunire.

"Upon this review it appears to me that the power of nominating to a

and making a corporal oath to the king's highness, and to none other, in form as is afore rehearsed, shall and may from henceforth be thronised, or installed, as the case shall require, and shall have and take their only restitution out of the king's hands, of all the possessions and profits, spiritual and temporal, belonging to the said archbishopric or bishopric whereunto they shall be so elected or presented, and shall be obeyed in all manner of things, according to the name, title, degree, and dignity that they shall be so chosen or presented unto, and do and execute in every thing and things touching the same, as any archbishop or bishop of this realm, without offending the prerogative royal of the crown, and the laws and customs of this realm, might at any time heretofore do.

7. "And be it further enacted by the authority aforesaid, that if the prior and convent of any monastery, or dean and chapter of any cathedral church, where the see of an archbishop or bishop is within any the king's dominions after such licence as is afore rehearsed, shall be delivered to them, proceed not to election, and signify the same according to the tenor of this act, within the space of twenty days next after such licence shall come to their hands, or else, if any archbishop or bishop within any

of the king's dominions, after any such election, nomination, or presentation, shall be signified unto them by the king's letters patents, shall refuse, and do not certify,* invest, and consecrate with all due circumstance as is aforesaid, every such person shall be so elected, nominate, or presented, and to them signified as is afore said, and within twenty days next after the king's letters patents of such signification or presentation shall come to their hands, or else, if any of them, or any other person or persons, admit, maintain, allow, or do, or execute any sentences, excommunications, interdictions, inhibitions, or any other process or act, of what nature, name, or quality soever it be, to the contrary, or let of the execution of this act, that then every person and particular person of this realm, and every dean and particular person of the chapter, and every archbishop and bishop, and all other persons, so offending and doing contrary to this act, or any part thereof, and their aiders, counsellors, and abettors, shall run into the dangers, pains, and penalties of the Statute of the provision and præmunire, made in the first and twentieth year of the reign of King Edward III., and in the sixteenth year of King Richard II."

* *Vide ante*, 1498. in *not.*

vacant bishopric is given to the king, and that the archbishop has no authority to judge whether the king has properly exercised that power.

"If, for default of election, the king nominates to the archbishop, the archbishop is made liable to a penalty if he refuses and do not consecrate within twenty days; and in this case it was not contended that he is empowered to sit in judgment upon the propriety of the king's nomination.

"If upon any sufficient grounds within his knowledge he should remonstrate against the command, it is not easy to suppose that the penal law would be resorted to against him; still, if it were necessary to decide the right, the king, in my judgment, is here made supreme, and the duty of consecration is imposed on the archbishop, whether he approves of the person presented, or not.

"In case of an election by the dean and chapter of the person named in the letter missive, the king is to command the archbishop to confirm the election; and this brings us to the point of contention between the parties, whether this command to confirm operates according to the usual meaning of those words, or as a command to try the validity of the election in respect of the regularity of the proceedings and the qualifications of the elected, and to adjudge whether it shall be confirmed or annulled.

"According to the general rule, the words of a statute should be construed in their ordinary sense, so as to give effect to all its parts. Now, in the ordinary sense of the words, a command to confirm an election does not involve an authority to annul it.

"If the other parts of the statute are regarded, it is provided that the election by the dean and chapter of the king's nominee shall be good and effectual to all intents, and the clause relating to the command to confirm immediately follows. Confirming, in its ordinary sense, is consistent with this provision; but it is a contradiction in terms to say that an election may be good and effectual, to all intents, that is, absolute and conclusive, and at the same time voidable and inconclusive.

"The enactment that the person elected shall be reputed and taken by the name of the lord elected, is inconsistent with a power to adjudge him disqualified; and it is very notable that he is to make oath and fealty for the office before even the command for confirmation issues.

"The enactment prohibiting the archbishop from refusing and omitting to confirm and consecrate for twenty days, and from admitting any process to the let of the due execution of the statute, is inconsistent with the supposed duty to invite and receive objections, and to decide whether he will confirm or refuse.

"If analogy be consulted, no reason can be suggested why the nomination of the king, by letters patent, should be absolute; and the nomination of the king, by letters missive to the dean and chapter, should be subject to review. The statute, therefore, if construed by ordinary rules, does not operate to impose on the archbishop the duty, or to give to the applicants the right alleged.

"But it is contended that the confirming of the election of a bishop by the metropolitan has a technical sense, to be found in the canon law, and expresses an examination by him into its validity, both as regards the proceedings of the election and the qualification of the elected; that this power of the metropolitan was exercised from the earliest times of Christi-

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anity throughout the Christian world, and had accordingly prevailed in England down to the time of Henry VIII.; and that, therefore, the legislature intended it should have this technical sense in the statute in question.

"In support of these views, many passages from writers on the canon law and from historians were adduced. Also, the form of citing all opposers to appear and state their objections, which has been in use upon confirmations, at least from the time of Queen Elizabeth, was much relied on; and the advantage of giving to the archbishop this power of inquiry, and to the people this power of objecting to the bishop elect, was mentioned.

"But these grounds are, in my judgment, untenable. In the first place, the reception of evidence of extrinsic facts, for the purpose of affecting the construction of a statute thereby, and altering the received meaning of known words, is dangerous, if not illegal. But supposing the evidence to be receivable, the assertion that any such usage of confirmation by the archbishop prevailed in England down to the time of the passing of the statute, does not appear to me to be proved. The preamble brings before us stat. 23 Hen. 8. from which it is to be gathered, that nomination and presentation by the king to the pope was the course then for the making of bishops, and that inconvenience had arisen from exactions and delay by the pope, and therefore provision is made for the king to nominate and present to the archbishop, and for the archbishop to consecrate the bishop so nominated in case of delay by the pope; and the course thus provided is described to be 'according and after like manner as divers archbishops and bishops have been heretofore in ancient time by sundry the king's progenitors made, consecrated, and invested, within this realm.' The making and consecrating of a bishop is mentioned several times in this preamble; but confirming is not mentioned, nor is there a sign in the statute that confirmation by the archbishop was then in use in England. The preamble asserts the former practice of the kings of England to nominate for consecration.

"The reference to history leads me to the conclusion that bishoprics were donatives of the king under the Saxon and some Norman kings: from the charter of King John to the reign of Edward III. bishops were elected by the dean and chapter, and confirmed by the archbishop; and that from the reign of Edward III. to the time of this statute, the pope had superseded the archbishop, except on a few occasions when the papal see was powerless.

"Then, what foundation I would ask, has the Court for assuming that the usage of confirmation, in the sense now contended for, prevailed in fact, or was generally known down to the time of the statute, when the evidence is satisfactory only as to the interval from King John to Edward III.?

"It is also necessary to ask what foundation in fact there is for supposing that the legislature referred to that part of the canon law relating to confirmation of ecclesiastical elections, which has been cited. The doctrine is that law on this subject is shown to have originated in the early ages of Christianity, when the whole Christian community being the church, joined in the election of bishops, and the rules were pertinent to contested elections by large numbers, but are extremely inapplicable in case of a

nomination by the king, whether direct, or circuitous through the medium of a dean and chapter.

"The foreign canon law has no binding effect in England; and the object of the statute which immediately precedes the statute in question, was to limit the canon law of England. It recites, that several canons were thought to be prejudicial to the prerogative, and repugnant to the laws and statutes of the realm, and creates a commission for revising that law, and provides, that until this revision shall be complete such canons only shall be used and executed as they were before the making of the act, and of these such only as were not contrariant to the laws, statutes, and customs of the realm, nor to the damage or hurt of the king's prerogative. It is improbable that the parliament which so regarded the canon law, intended to use the word 'confirm' not in its usual sense, but in a sense admitting a reference to that law in limitation of the important statute now in question.

"The proclamations purporting that those who object to the bishop elect shall be heard at the time of the confirmation, were next pressed upon us, as showing that the law was in accordance with their purport, and that the word 'confirm' in the statute, was used in the technical sense before-mentioned. But, if the construction of the statute is as above stated, it is inconsistent with the right indicated by the form, and a proclamation would be of no avail against a statute.

"Furthermore, if the proclamation be a mere form, it affords no presumption of any right; and, inasmuch as the election of a bishop by the dean and chapter is a mere form, and confirmation of an election is part thereof, the strong presumption is, that the confirmation of a merely formal election is itself mere form. Indeed, it is in effect enacted to be merely formal; for the statute declares the election to be good, which is the substance of confirmation, and therefore it leaves nothing but a form to be added.

"It is obvious to legal experience that numerous forms of words prevail in our law, which are at variance with the fact they purport to state, some being vestiges of rights that have ceased, some being fictions to cover changes introduced in the law, and some from other sources. No reason is suggested why the form used by the apparitor at the confirmation may not belong to this class.

"If it had been more than a form, the right of opposing would probably have been exercised; yet no one recorded instance has been produced of an opposer having exercised the right now claimed by the applicants, in any country, or at any time. The industry and research have been extreme; no restriction has been placed on reference to any kind of work, English or foreign, legal or historical; and all that has been shown in the way of acting on the right, before the present year, has been the attempt against Bishop Montague, in the reign of Charles I., which was evaded without a decision; and the reported intention of making the attempt in two other cases (1), which never reached to action.

"If the evidence of the practical exercise of the right wholly fails, so does the evidence of opinion among the writers of recognised authority on

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(1) It is presumed that the learned and the present Bishop of London, judge refers to the cases of Dr Rundle,

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English law. From Lord Coke to Mr. Justice Blackstone, no expression of any author has been adduced to show that the right in question was considered by him to exist, or had been brought to his notice.

"The absence of usage, and the absence of recognition by text writers, is not merely a failure of support for the case of the applicants, but of positive force against them.

"We were further pressed with the importance of a right tending to insure excellence in bishops, and to increase the confidence of the people in the Church establishment, and such results were urged as making the existence of the right probable. But if there are advantages on one side, the evils which suggest themselves to a practical mind, may more than counterbalance, — nay afford a strong argument to the contrary. But this inquiry is ill suited to the office of a judge, who has to declare the law as it is, not as it ought to be; and as the inquiry would lead to considerations that might seem disrespectful to others, if the abuses of the institution which may easily occur were pointed out, I merely suggest the nature of the answer that may be given.

"Another point was made for the applicants in answer to the construction of the statute, namely, that the sole purpose of the legislature was to put an end to the interference of the see of Rome with the English Church, and that the statute ought to be so construed as to limit its operation to that result.

"But the intention is clearly expressed both to prohibit the interference of the pope, and also to lay down substantively the manner and form of electing, presenting, and consecrating the bishops of the church so severed from Rome. Effect must be given to every part of the statute, and those who claim to be bishops of the English Church ascertain their title by its positive enactments, which are complete without the negative enactments relating to Rome: the full operation of the statute not only destroys papal influence, but declares the rights of the king, and fixes clear limits against encroachment; and the legislature, warned by the history of past troubles, had reason to provide against future contentions between the Crown and all ecclesiastical authorities.

"After giving my best attention to the argument, my mind is brought to the clear conclusion that the supposed right does not exist, and that the rule for a mandamus ought to be discharged."

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MR. JUSTICE COLERIDGE. — "I am now to deliver my opinion upon this rule which has been argued at the bar with such remarkable learning and ability; and I cannot but express my regret that I am called on to do so at so short an interval after the discussion, and one, so much engaged, as entirely precludes the deliberate and satisfactory consideration of the argument and attentive examination into the authorities, which the importance of the question at issue deserves. I regret this the more deeply, because I feel myself compelled to differ, I fear, from my Lord, and, as I learn, from my brother Erle, not merely upon the legal conclusion to be drawn from the arguments adduced, but upon the practical disposal of the rule before us. Upon the former I should express myself with diffidence, even if I had the happiness to have them concurring with me. The question, narrowly and simply as it may be propounded, has yet been argued, and properly argued, on grounds so large, and inquirers have been

instituted so various, so wide, mounting up to such remote and obscure antiquity, spreading out into branches of law with which we are so little familiar, that it is rather excusable in an advocate than possible, I think, for a judge, to express himself with any strong confidence upon it. At least, speaking for myself, I must confess unfeignedly such is the state of my mind after such examination as I have been able to give to the subject. Upon the latter, the mere disposal of the present rule, I must avow in sincerity that I have no doubt; and it is a great consolation to me that by the course which I should recommend, any error of judgment into which I may have fallen, would not be final.

"I am not insensible to some, it may be great, public inconvenience which might result from the needless agitation of a question such as the one before us. I own I think it has been somewhat exaggerated; but whatever may be its amount, it is to be remembered that there will be no light compensation in the more satisfactory settlement by a conclusive and final judgment in the highest resort, which it would then receive. But, after all, the inconvenience is not all on one side, and there is no consideration so strong with me as the danger of doing a final injustice, by unnecessarily taking a course which precludes all further consideration.

"I cannot doubt that those from whom I have the misfortune to differ, entertain these feelings in general as strongly as I do myself; but I presume they think the present question one, with regard to which they cannot properly be indulged. They regard the application to the Court as mischievous, or at best of little practical importance; one not to be listened to with favour, to be complied with only so far as it is rested on the clearest and most demonstrative evidence. The course of my judgment will show to what extent I differ from them in this opinion.

"On both sides it has been urged that the interests of the Church are at stake, and no doubt to some extent they are; but I trust and believe that in this respect also, some natural exaggeration exists on both sides, and that when the ferment of the moment shall have subsided, it will be found that neither to have secured or enlarged her just freedom of action on the one hand, nor on the other to have laid more bare, or more firmly to have rivetted the restraints imposed on her by the statute, will have vitally affected those precious and immortal interests. For my own part, I am desirous, and I am not ashamed to confess it, entirely to forget, for a moment, considerations which affect the mind so powerfully as it may be to disturb its calmness, and to regard the mere question before me more coldly. In this feeling it is that I desire to rest my judgment on this narrow ground, simply on my conviction that the applicants have laid such grounds before the Court, as according to its usual course and the principles which have usually governed our discretion, entitle them to the writ of mandamus, and to call on the defendants either to demur, or to make a return.

"And the first questions which arise preliminarily almost in the way of the argument are, Is this the case in kind, in which a mandamus can issue? Have these parties such an interest as entitles them to demand it at our hands? Upon these by way of direct answer I shall be the less full, both because I believe the Court are agreed to the extent at least of thinking that there is no such difficulty on either point as should prevent the writ

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from issuing, and also because the more full and complete answer in both respects will depend on the result of the more general discussion that remains behind. For the present, therefore, I will only say that I think this was a case of an inferior court with a question before it for decision, in which parties lawfully summoned to appear, and having a sufficient interest, have prayed to be allowed to appear and to be heard, and have been refused.

"If this general statement be true, and I admit that its truth will depend on the result of the whole argument, I think it cannot be doubted that it is within the province of this Court by mandamus to compel the inferior court to admit them to appearance, and hear their allegations. Nor will it be an answer simply, that such inferior court is an ecclesiastical one, or the matter in discussion of ecclesiastical cognisance; the ecclesiastical courts, as such, are not withdrawn from the general superintendence or control which this Court exercises by mandamus, or prohibition over all inferior courts. We cannot, indeed, direct the course of their proceedings, or prescribe their judgments beforehand, nor review them in the way of appeal afterwards; they are the judges of their own practice, they are to frame their own judgments according to their own law, when that law alone is to be the rule of decision; but still we shall compel the ecclesiastical judge, as we would any other inferior judge, to act in his duty, just as we should, and constantly do, restrain him when he appears to be about to exceed his jurisdiction.

"This stands on the clearest principle, and it would, I believe, have been hardly necessary to say the few words I have said on this subject, but for the misunderstood case cited in the argument on this point, of *The King v. The Churchwardens of St. Peter's, Thetford*. (1) That case is so often cited and its importance so magnified, that one is surprised to find its whole statement and argument comprised in six lines, and its judgment in less than two. The Court there refused a mandamus to churchwardens alone, to make a rate for the repairs of the parish church, saying, that it was a subject purely of ecclesiastical jurisdiction. I, for one, do not question, upon consideration, the propriety of that decision; though perhaps I might wish that the judgment had been reported at greater length, or expressed in less general or more qualified language. The whole subject-matter of church repairs and church rates is of ecclesiastical cognisance; to the ecclesiastical court the applicant was bound to go in the first instance, and there was no reason to suppose that that Court would close its doors against him; there was no alleged defect of justice, and therefore no ground for this Court's extraordinary interference. What bearing that decision has on the present case it is very difficult to see.

"Nor, I think, does any difficulty arise from the fact that the ecclesiastical court here has heard one side, and proceeded to judgment. In the course of the argument, the counsel were asked whether any case had been found in which, under such circumstances, the writ had gone, and the answer was in the negative. Mr. Robinson has referred us to the case of *The King v. The Justices of Carnarvon*, in the 4th vol. of *Barnewall and Alderson*.

(1) 5 T. R., 334.

p. 86., in which, on an application for a mandamus to sessions to hear where they had decided, Mr. Justice Holroyd said, 'If it had appeared in this case that the sessions had heard one side, and had altogether refused to hear the other, I should have thought it the same as if the case had not been heard at all, and I should then have been of opinion that this mandamus ought to issue.' It is always very satisfactory to have such authority as Mr. Justice Holroyd's for any position one lays down; but I confess that, without it on this point I should have had no difficulty. In regulating our discretion as to the issuing of a mandamus we are to be guided, I think, rather by principle than precedents. In order to secure the full and complete administration of justice, we are to regard substance, and not form, or we shall be entrusted to little purpose with this invaluable writ. If the case on the part of the applicants be in other respects well founded, the hearing that has taken place is the same as no hearing; the decision is no decision.

"This last observation, with another closely connected with it, disposes of another objection, that the complaint of the applicants is in truth a complaint against the court below, of an error in its practice or its decision, and their remedy by appeal. If there has been no decision, there can be no appeal; if there has been no party, there can be no appellant. And so as to the right of a party to prosecute any particular suit in any particular court; that court may have its own rules according to which that question will be to be determined as it arises, and this court will not in general interfere with such rules, still less with the Court's decision upon them; but before the point arises for decision, before the Court can apply its rules, the party must be admitted as a suitor to state his case.

"Considerable stress was laid by the counsel against the rule, on the want of interest in the applicants to entitle them to come to us for the writ. On many grounds it seems to me that they had sufficient; they are all, indeed, involved in the general question, which will remain to be discussed presently. If the whole proceeding on which the inferior court was to be engaged was a mere form and shadow, if the citations to appear were mere mockery, interest in anybody there could be none; and on the same supposition these applicants have no interest here; at all events, it would be a waste of the time of the Court even to listen to their application. But on the other supposition, which for this purpose they have a right to make, the citations themselves seem to give them an interest, and still more the relations which two of them, as incumbents in the diocese of Hereford, have in the faith and doctrine of their future bishop. We have more than once determined that the interest which an inhabitant, merely as such, and though no member of the corporate body, has in the good government of the borough or city which he inhabits, is sufficient to entitle him to be relator in a quo warranto filed to question the election of the mayor or members of the town council; the analogy between the two cases seems to me to be perfectly just.

"It is not worth while to notice the objection founded on the Church Discipline Act, which could scarcely have been seriously urged, and I pass without further delay to the great question in the case, the proper construction to be put upon stat. 25 Hen. 8. c. 20. And in applying myself to that question I need not say in this place, that our object must be to ascertain, not what it might be supposed Henry VIII. intended or wished,

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but the true meaning of what the legislature has written. If the former consideration could be properly admitted into the inquiry, or the evidence upon it ascertained satisfactorily, I have no reason to believe that it would be in the result unfavourable to the view I take of the statute; but on general principles that cannot be; it is not *quid voluit Rex*, but *only quid dixit Parliamentum*, that lawyers, indeed any reasonable interpreters of the law, can inquire into.

"The statute in the fifth section enacts, that after an election of a bishop by the dean and chapter of the cathedral church of the see, the king shall signify the election to the archbishop of the province, requiring and commanding him to confirm the said election; and the question now for the first time to receive a judicial decision is, What is the import of this command? On the one hand, it is said, that it created a new duty in the archbishop, invested him with a new function, but that the duty and function were both purely ministerial, and the act to be done a mere valueless form; on the other, it is contended that the act of confirmation is a solemn important judicial act, which from the earliest ages of the Christian Church it was a part of the archbishop's or metropolitan's duty to perform, and that the command in the statute was to perform that act, in virtue of that office, with all its attendant responsibilities in the officer performing it, and consequences to the election with regard to which it was performed.

"It is obvious that those who maintain this latter ground, take upon themselves a large burden of affirmative proof. In order to show what confirmation means in this section, they seek to show what it meant from the earliest ages down to, and at the time of, the statute's passing; and no one will question, but that this, if satisfactorily made out, is both on legal principles of interpretation, and according to the plain common sense of mankind, a proper mode of arriving at the true meaning of the word. If the confirmation of a bishop elect was a process, known at the time of passing the act, of a certain nature, to be performed by a certain functionary, and having certain consequences, the language of the legislature simply directing that functionary to go through that process, would deceive and mislead, unless it were used in that sense, and as containing and involving every thing so known and understood.

"I use the words 'simply directing,' because the legislature might use the word, though incorrectly, in any other sense; and if other parts of the statute make it clear directly, or by strong inference, that it was used in some other sense, unquestionably that must prevail. It is necessary therefore for the applicants to examine all parts of the statute, and to show that, taken altogether, no inference can thence be drawn, which contradicts the presumption to be drawn from their antecedent historical evidence.

"Even if no such inference can be drawn from the statute itself, it might be, though not so easily or clearly, drawn from the provisions of other statutes contemporaneous or about the same period *in pari materia*; it was fitting, therefore, to take such statutes, if any, into the account. Lastly, it was right to examine, what, in point of fact, was done, and has been done, at the time, or in succeeding ages, by those who were to obey the statute. No usage can control the unambiguous language of the law, no disuse can render it obsolete; but when the question is upon the meaning of the language, what has been done under it may be inquired into, as

of more or less cogency, according to circumstances, in determining that question.

“There are, then, four heads of inquiry. The first, third, and fourth may be considered, for the most part, inquiries into matters of fact; the second is one of construction. I do not propose to follow the applicants through them all; the time forbids my doing so satisfactorily, even with regard to those that I shall inquire into. In my opinion, they have made, upon each and all, a case so strong as raises a firm belief in my mind that the conclusion they come to is the true one; and I think they have on none received such an answer, or had such difficulties raised, as disentitle them to the writ they ask for. This is enough for me to assert. By the practice of this Court, as I have always understood it, and as it has been acted on uniformly, since I have had the honour of practising at its bar and sitting on its bench, the discretion of the Judges has been regulated as to the issuing of the writ of mandamus thus: they have not required absolute certainty in fact, or a clear or unanimous opinion in law, as the ground of issuing it. If the fact be made so probable as to require an answer in reason, or an answer be attempted in the affidavits of those who show cause, it has been thought right to let a jury decide the question. If the conclusion of law be probable in favour of the motion, or the question be one of difficulty, requiring a solemn decision, it has been thought right to let it be raised on the record. Since the recent interposition of the legislature, which has made our judgment on such record subject to revision in Courts of Error, it is obvious that the reason for this latter branch of the rule has received a much increased force.

“Two general remarks must still be made before I examine the historical evidence prior and down to the passing of the statute. If that evidence were now before a Jury, and a Judge were summing it up, I apprehend it would be his duty to tell them that it was to be considered by them with a reasonable allowance for the circumstances under which it was produced, and, among those, especially the length and remoteness of the periods through which the chain was sought to be carried. To expect that a title which is to be traced down for centuries, through periods, many of them, of struggle and disturbance, which was subject to the confusion occasioned by contending claims and foreign usurpations, should be made out with the unbroken continuity and uniform clearness which might properly be required in discussing a simple transaction of to-day, could not even then be required, because it would be impossible to accomplish, and therefore unreasonable to ask for it. Independently of the effect of these circumstances on the evidence, they must be expected to produce something of a similar kind on the title itself, or series of facts which is the subject-matter of the evidence.

“What we said in a case in which we had to consider an ancient franchise of the University of Cambridge, being invited to disturb its enjoyment on ingenious objections, may be not improperly applied here. ‘It follows,’ we said, ‘almost necessarily, from the imperfection and irregularity of human nature, that a uniform course is not preserved during a long period: a little advance is made at one time, a retreat at another; something is added or taken away from indiscretion or ignorance, or through other causes; and when, by the lapse of years, the evidence is lost which

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would explain those irregularities, they are easily made the foundation of cavils against the legality of the whole practice. So also with regard to title: if that which has existed from time immemorial be scrutinised with the same severity which may properly be employed in canvassing a modern grant, without making allowance for the changes and accidents of time, no ancient title will be found free from objection; that, indeed, will become a source of weakness, which ought to give security and strength.' (1)

"If considerations like these ought to have place, and such language to be held, in regard to this evidence, on a trial before a jury, it is obvious that, in the present stage of the inquiry, they have tenfold propriety and weight. I do not present it as an analogy strictly conclusive; but the province of the Court at present resembles more that of the Grand than of the Petty Jury. If we refuse the rule, we do indeed preclude further inquiry; we pronounce our opinion that there is nothing to be inquired into; either that the evidence is so worthless or irrelevant, or the subject-matter so unimportant that we will shut the door of justice on the prosecutor; but if we grant it, we only say the present state of the proof requires an answer; enough has been done to make the case fit for further inquiry and more solemn decision. If this be so, surely we ought to examine the evidence with candid minds, making due allowance for all its inevitable difficulties. We should remember that it travels into remote periods, and turns upon facts of a kind which do not often come before us, and a law and legal literature with which we cannot be familiar. Whatever decision we now pronounce (I speak as I feel for my own share in it), is more than commonly obnoxious to error: it is a safe rule — a conscientious rule — it is *the* rule of the Court, as I at least understand it, to decide so that error may be less likely to end in final injustice.

"It is under these conditions that I enter on the inquiry I propose to make. The case on the part of the applicants commenced with evidence offered even from the Apostolic ages of the Church. I am content to start from the General Councils. I presume the authority of these Councils, as a matter of Church government in England, before the Reformation, will not be questioned. Even as to matters of doctrine, their authority is expressly recognised by the Legislature, after the Reformation in the stat. 1 Eliz. c. 1. s. 36. At a time when Christendom was united as one body, it was considered to represent the whole inhabited earth; and when the springing up of any important heresy or other such urgent cause occasioned the assembly of a council from all nations, it was oecumenical, *ἐκ παντὸς τοῦ κόσμου*, and bound all the members of the one entire body. Four great heresies, it is well known, occasioned the summoning of what Hooker calls 'four most famous ancient General Councils'; and of these we have canons by two, those of Nice and Chalcedon, which speak of the confirmation of episcopal elections, in terms, as being *penes Metropolitanum*; that one elected *prius voluntatem et consentientiam Metropolitanum* ought not to be a bishop *non debere esse Episcopum*. Limit these last words as you please, though if you construe them by the light of the former, you cannot much reduce their force; assume, if you will, that these canons had reference to a period when elections of bishops were more popular than even is now

(1) *Reg. v. Archdall*, 8 A. & E., 288.

they have been in England since the Conquest, though both Councils, be it observed, were called by Imperial authority after the establishment of Christianity, and after the rulers of the earth had assumed part in the nomination to bishoprics; still you have the undisputed fact, that in those very early ages the Metropolitan did intervene; his confirmation was necessary to complete the election of one of his Comprovincials. Could any thing be more reasonable than that he should intervene, when he was to administer consecration, and when the bishop elected was to rule over a diocese within his province, subject to his visitatorial power, liable to deposition at his hands.

"I am compelled to pass over a large body of evidence of the same kind, some from General, some from National Councils; for I am only indicating the grounds of my opinion, not going into the whole detail of the evidence. These precede the rise of what is called the general canon law. Now, as I understand it, it is not so much contended that, under this law the point is not satisfactorily made out, as that there is no ground for admitting this law, as of any authority in settling the question with regard to England. When we speak of England before the Reformation, I confess I hardly understand this difficulty. We speak, then, of a country within the pale of the Roman Catholic Church, admitting 'our holy father, the Pope,' as he is commonly termed in the very statutes which sought to restrain his usurpations, to have in spiritual causes and matters appellate jurisdiction from all ecclesiastical judges here. The canon law regulated all decisions in spiritual matters at Rome. The decrees of Councils and of Popes, the opinions of learned men, and other sources on which it was founded, would be naturally received as authority in the courts of other countries from which appeals lay to Rome. In this country they obtained their binding authority, no doubt, from custom, and were subject to the control of our statute and common law. Some instances of this control are familiar to lawyers, but it operated in comparatively few and exceptional cases. As the general rule, it is quite safe to say that our ecclesiastical courts govern themselves by the general canon law, which was, in truth, the law of that general Catholic Church, of which the English Church was a branch. Concurrently with this, however, we had a national canon law, not a complete system, or furnishing a rule of decision, if taken by itself, for all cases; for this was founded solely on occasional Legatine constitutions, or ordinances of national or provincial synods. Upon these we have the comments of Lyndwood and John de Aitho, which show conclusively that they were never intended to overrule generally, or supply the place of the general canon law, or to do anything more than to supply deficiencies, where particular local circumstances made it necessary.

"In this part of the argument it is hardly in course to consider the effect of this law after the Reformation, but I stop for one moment in consequence of an observation or two which has been made, to offer an observation upon stat. 25 Hen. 8. c. 19. as it affects the present state of the canon law in this country. Now, the proviso which has been referred to at the close of this statute, refers expressly to the preamble and is confined to it; but that preamble is not speaking of the general canon law, it is speaking of the canons that had been ordained in the provincial synods or councils of this country. 'Whereas,' it says,

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'the king's humble and obedient subjects, the clergy of this realm of England, have not only acknowledged according to the truth, that the convocations of the same clergy is, always hath been, and ought to be assembled only by the king's writ, but also submitting themselves to the king's majesty, have pronounced in verbo sacerdotii, that they will never from henceforth presume to attempt, allege, claim, or put in ure or enact, promulge or execute any new canons, constitutions, ordinance provincial or other, or by whatsoever other name they shall be called in the convocation, unless the king's most royal assent and licence may to them be had to make, promulge, and execute the same, and that his majesty do give his most royal assent and authority in that behalf. And whereas divers constitutions' (the lawyer immediately remembers the constitutions of Othobon and Otho that are stated in Gibson), 'ordinances and canons, provincial or synodal, which heretofore have been enacted and be thought not only to be much prejudicial to the King's prerogative royal, and repugnant to the laws and statutes of this realm, but also overmuch onerous to his Highness and his subjects, the said clergy hath most humbly besought the king's highness that the said constitutions and canons may be committed to the examination and judgment of his Highness and of two and thirty persons of the King's subjects.' And then it goes on to state the terms of the commission which is to be appointed for the investigation. Then, after enacting the mode in which the Commissioners are to proceed, it provides:— 'That *such* canons, constitutions, ordinances, and synodals provincial being already made, which be not contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the King's prerogative royal, shall now still be used and executed as they were afore the making of this act, till such time as they be viewed, searched, or otherwise ordered and determined by the said two and thirty persons.' It is well known that that Commission never was effective, and it is upon that footing that what I call (distinguishing it from the general canon law) the national canon law of this country at present stands.

"When, then, upon a point of ecclesiastical law arising before the Reformation, the decretals or canonists are cited, surely the presumption is, that they tell us truly what the Church law in England then was, and the onus lies on him who would allege that, by reason of some statute or contrariant rule of the common law, the case was not to be decided by them.

"I do not cite again the different passages referred to in the arguments, nor enter into the criticism which was addressed to show that some of them did not apply to confirmation of Episcopal elections. The result to my mind at least, left it clear that what had been decreed by councils had been adopted into the canon law; that elections were subject to confirmation by the Metropolitan; that such confirmation was a real judicial proceeding; that the process of the election, processus electionis, and the persona electi were the subjects for consideration; as to which witnesses were examined, and the result was not unfrequently unfavourable to the elected. It was contended that "persona electi" limited the inquiry only to his identity; but this was conclusively disproved by the causes assigned more at length in some of the cited passages, and also in some instances actually recorded in history, from which it appeared that the morals, learning, legitimacy, any thing, in short, which went to make up canonical fitness, were

made the subject-matter of inquiry. And I may observe, in passing, that I do not remember a single instance in which the *persona electi*, limited to the point of mere identity, was ever brought into question at all.

"When it was sought to show the actual application of this law of confirmation to elections of English bishops, a difficulty was raised to which the frequent struggles between our Monarchs and Rome lent a colour. When the Monarchy was weak or the throne contested, the Papal power often made advances; the practice of Provisions would often interfere with the Metropolitan's confirmation, for if the Pope nominated, of course a confirmation was needless: often, too, it would be that that which was properly the appellate jurisdiction, would draw to itself improperly the original cognisance. Still, after every deduction made on these accounts, a body of proof remains substantial and abundantly satisfactory, that the ordinary jurisdiction of confirmation was in the Metropolitan.

"Here I allude, as I intended to do before, to the instances cited from Wharton's *Anglia Sacra*, a book undoubtedly of great interest, not merely, be it remembered, a modern work — to speak as modern of any work written in the 17th century, not merely an original work of the author at that time; but, as it appears from examining into it, in great part a collection from ancient, and some of them contemporary writers. The instances adduced by Mr. Badeley, ranged from 1277, 5 Edw. 1., to 1416, 3 Hen. 5. (1) I do not mean to repeat them, but I take the first, for two or three reasons, it is remarkable for several circumstances which are mentioned in it. The monks of Winchester elected Robert the bishop of Bath and Wells; the Archbishop of Canterbury rejected him for having formerly been a pluralist, and this was done by virtue of a canon of the council of Lyons, passed only three years before. It is observable that in one of the Constitutions of Otho or Othobon, I forget which, the same circumstance, *pluralitatis causa*, is made the ground of objection to the election of a bishop. A second elected in his place was rejected by the Archbishop, for the same cause. Here we have two instances in which a canonical offence first created by a foreign council, was made the ground of rejection. Upon the second occasion, the Bishop elect appealed to the court of Rome, where he was opposed by the primate who is spoken of as a man, *ecclesiastice discipline observantissimus*. Wharton says, he was so intent on sustaining the rejection as to declare that he would resign if the case were decided against him, and he succeeded in having his judgment confirmed. But then the Pope took occasion to appoint to the vacant see himself, and caused the consecration to take place at once at Rome. The new Bishop appears from his name, Pontissara, to have been an Italian, already archdeacon of Exeter, probably by Papal Provision, and Professor of Civil law at Modena. This extract, while it is strong to show the reception of the canon law, the jurisdiction of the Metropolitan, and the reality of the confirmation, shows also the irregularities which would often occur and disturb the exercise of that jurisdiction, owing to Papal interference.

"This author is full of instances which show the operation of Papal Provisions, and of appeals to Rome, in the most interesting manner. The

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(1) 1 Wharton's *Anglia Sacra*, 315, 349, 732, 735, 736 755.
357, 417 511, 631, 637, 640, 713, 719,

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case of Robert Orford, the fourteenth bishop of Ely, I may mention as an example, where, after election objected to, and cancelled by the Archbishop, the party goes to Rome and appeals against the rejection. A discussion is stated to have taken place before the Pope and his Cardinals, a statement is made by the Bishop elect to the Pope, of the examination which he had undergone, and the answers that he had made. He appears to have conducted himself so well, that the pope says, "Certe, fili, bene respondisti. Non te invenimus, sicut scripsit nobis frater noster Cantuariensis, vas vacuum, immo vero omni bonitate et scientiâ repletum te esse approbamus." Et suam confirmavit electionem ac ibidem celebrari fecit ipsius consecrationem.' Here is an instance in which the appellate court pronouncing the judgment which ought to have been pronounced below, carries it into effect by celebrating the consecration upon the spot. The termination of this affair shows an instance of the real grievance which this country sustained under Papal exactions and usurpations; for it is said, 'His itaque negotiis feliciter expeditis, iter versus Angliam statim arripuit, et ad suam Elyensem ecclesiam prosperè pervenit, plus quam xv. millibus librarum aere alieno oneratus.' So that the appeal had cost him 15,000*l.*, the enormity of which sum at that time of day can be easily ascertained.

"I have stated that the latest instance which I have noted, as referred to in the argument, was of the year 1416; the case of John Wakeryng, bishop of Norwich. He was confirmed by the Metropolitan, under circumstances which at first sight create a difficulty, but I think on consideration are not only explainable, but may serve to throw light on the language of the statute now in question. This was the period of the great Papal schism. There were three Anti-popes; Henry V. preserving a neutrality between the rival candidates, treated the see of Rome as vacant, and by consequence those bulls and briefs which had become established as necessary to the completion of episcopal election, could not be procured from any one. An act of Parliament, therefore passed in 3 Hen. 5. reciting that, for this reason, confirmations could not be made, and great inconveniences followed, and enacting that during the avoidance of the Apostolic see, Bishops elect should be confirmed by the Metropolitans, without excuse or delay made on that account, and that the King's writs should issue to the Metropolitans, straitly charging them to perform the said confirmations, and all that to their office therein appertains; and also to the elected that they should effectually pursue their confirmations before the Archbishop. In the fourth volume of Rymer, in the second part, p. 156, will be found the writs accordingly issued both to Wakeryng, the bishop elect, and the Metropolitan for the confirmation. That to the latter enjoins him to proceed, 'Absque excusatione seu dilatione aliquali procedatis ac cetera omnia, quæ vestro canonicè incumbent officio, in hac parte peragatis, et exequamini.' It is not to be inferred that the confirmations were ordinarily by the Pope, but that the Metropolitan could not proceed to confirmation or the other duties which were canonically incumbent on him as such, upon the election of a suffragan within his province, without a mandate or bull from the Pope. The language of the statute and writs shows that confirmation was part of the canonical duty of the metropolitan, and it shows also that at that time the King's assent to the election was not

sufficient by the common law of the Church without the Pope's sanction to the confirmation. The stat. Hen. 5. was a temporary measure, which met the difficulty occasioned by a vacancy of the Apostolic see; nothing can be stronger to show the imperfectness of the royal title of itself completely to fill up Bishoprics. We find from Wharton, (p. 417), that when the council of Constance had terminated the papal schism, and Martin V. was elected Pope, he ratified both the confirmation and consecration of this very Wakeryng, who had attended the council, with other ambassadors from Henry.

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"With the election of Martin, the stat. Hen. 5. would expire, and that state of things would revive, which the several statutes of Henry VIII. passed shortly before 25 Hen. 8. c. 20. and that statute itself show us to have been then existing; the chapters electing, with apparent freedom, but certainly under the indirect influence of the Crown; the Pope then upon request issuing various bulls, which had been made necessary, no doubt, for the purpose of exercising influence and exacting money; among others one to the Metropolitan to proceed canonically to confirmation and consecration; the metropolitan then undertaking the confirmation, subject to appeal, and finally on approval, if no appeal made, or the Pope did not by some assumption of power interpose, the consecration.

"Before I pass from this part of the subject, let me observe, that every case of Papal confirmation and consecration must not be taken as evidence against the Metropolitan's ordinary power. Rightly or wrongfully (and, had the bishop of Rome, happily for Christendom, been content with the lawful pre-eminence and power which he might have claimed as Patriarch, he would rightly have claimed appellate jurisdiction in such matters), but as matter of fact, he claimed and exercised it; if, therefore, he decided an appeal in favour of the bishop elect, his decision was in fact a confirmation, and he might, as appellate judge, then execute the duty of the inferior judge, and consecrate at once; when beyond this he took on him, having rejected the bishop elect, to confer the see on a nominee of his own, this was a mere usurpation, growing out of his wrongful assumption of the title and place of Universal bishop of the whole Christian Church.

"I now close an inquiry which I am sensible I have been led to follow to a wearisome length, and yet cannot expect, imperfectly as the case has been expanded even at this length, to have conveyed so clear a view to others as I seem to myself to have, or so strong a conviction that when Henry VIII. and his parliament came to legislate with regard to episcopal elections, they had to deal with confirmations by the metropolitans as real transactions, judicially conducted by them, in virtue of a jurisdiction from the earliest times inherent in their office. We are now to see how they have dealt with confirmations in the famous statute under consideration, but the examination which I have to make of its several clauses will be more intelligible, if I preface them with a statement of the general view which I take of its policy and purview. And in forming this, I think myself bound as a lawyer, to regard only the legitimate and certain guides to interpretation, which the state of things at the time it passed, the existing mischiefs proposed to be remedied, its own language, and contemporary statutes afford. The personal character or wishes of the monarch, on the one hand, it would be unsafe to attach much importance to, unless I knew, on the other,

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the amount of ability, sound heartedness, devotion, or power, which might be found in the individual framers who penned, or in the united body which enacted it.

"I conceive, then, that there were two prevailing objects; the first, to put on a clear foundation the royal power in the nomination of bishops. Although the Crown's right to present was in substance well acknowledged, whether depending on the supposed right of patronage, or the inherent and constitutional right of the Crown; yet, in the theory of the law, the office of bishop was an elective one, and elections were free, and these two principles would sometimes be found in contest with each other; the exercise too of the Crown's right, in spite of previous statutes, would, sometimes, indeed not seldom, be impeded by Papal interference, in the way of Provision. I may, in passing, observe, that the recitals of ancient statutes, and the language of our text-books, place the right of the Monarch much more on patronage than on imperial power. The bishoprics were donatives, in the commencement; because the Crown had founded and endowed them. When, at an early period, elections revived, the Crown was still patron, and presented; but then revived confirmation, and the analogy between a bishopric and an inferior presentative benefice was in this point complete. The second, and perhaps more urgent object was, effectually to prevent all interference from Rome with the completing the making of the bishop whom the Crown should have nominated, and also to secure the prompt obedience of the Metropolitan to the royal commands.

"For effecting the first object, it was not thought necessary, probably not desirable, to alter the ancient canonical mode of proceeding by election. If lawyers and canonists were engaged, as is probable, or consulted, in the framing of the act, they would be aware of many inconveniences that might arise from a departure from the ancient mode. The law had attached certain rights to certain steps in the process (see *Evans v. Acute*, Palm. 472,) and evils, foreseen and unforeseen, and of course not easily to be guarded against, might be apprehended. If divines, as is still more probable, were consulted, they would naturally be slow to sever one link unnecessarily from the venerable chain which bound our Church in communion with the great Christian commonwealth. Election, therefore, was preserved, but, as it was to be preserved in form only, that change was to be clearly and unambiguously made by the introduction of a new instrument, the *letter missive*; and the statute was so worded, that no question could possibly be raised, nothing was left to cavil or exception.

"Assuming that the Chapters proceeded according to law, for effecting the second object nothing new was required to be added in the remaining steps. Some things would be to be taken away. There would be confirmation, still as necessary as before, for there was no intention to interfere with the Metropolitan's inherent powers (1), or to disturb the ancient relations

(1) In the Formularies of Faith that were put forth by authority, about four years after the enactment of stat. 25 Hen. 8. c. 20, the following important passage occurs in the Institution of a Christian Man, which was not alluded to in the course of the argument, but was subsequently cited by the Bishop of Exeter in the House of Lords, in a discussion upon

some of the enactments of the foregoing statute —

"The second point, wherein consisteth the jurisdiction committed unto priests and bishops, by the authority of God's law, is to approve and admit such persons as being nominated, elected, and presented unto them to exercise the office and room of preaching the Gospel, and of ministering the sacraments."

between himself and his Suffragans, and the King might be deceived in his appointment, and did not arrogate to himself spiritual powers of dispensation. Not a word, therefore, was admitted which might be interpreted to derogate from the Metropolitan's jurisdiction; rather it was increased, by relieving it entirely from all Papal review. Consecration would follow on confirmation, as before; but in both it was necessary, especially at the time of the enactment, both to guard the Metropolitan on the one hand, and the Church and the Crown on the other in the case of Romish tendencies in the Metropolitan, from every sort of Papal interference or impediment, by the severest sanctions.

"If these were all the provisions of the statute, there would be no difficulty in the view I have presented of it; but something remains. Two parties were concerned in the making of a bishop, after the presentation by the Crown. The electors and the Metropolitan both might thwart the nomination; the former by refusing to elect, the latter by refusing to confirm and consecrate. The former might be punished for disobedience, but could not be compelled to elect; and therefore in the place of a formal election, where that was refused, the king was to nominate by letters patent. In reason, perhaps, it might have been expected that some new process equivalent to confirmation should have been provided. Confirmation itself in terms would not be preserved; for that was the act of a superior authority, and would have been a scarcely decorous process to be carried on in respect of one who was the direct grantee of the Crown, and ancient usage, besides, had appropriated that process to election. The Crown would be unwilling to create anew any substitute, and it was the less necessary because the Metropolitan's power and responsibility remained untouched in the consecration; and though he might be punished for wilful and groundless refusal to consecrate, he could not be compelled to do that act; and no provision was made (a most remarkable circumstance) for procuring the consecration by any other means of him whom the Metropolitan should refuse to lay his hands upon.

"Let us now see whether the statute itself does not agree with the view I have presented. The first and second sections recite those parts of 23

ments, and to have the cure of jurisdiction over these certain people within this parish or within this diocese) shall be thought unto them meet and worthy to exercise the same, and to reject and repel from the said room such as they shall judge to be unmeet therefore. And in this part we must know and understand that the said presentation and nomination is of man's ordinance, and appertaineth unto the founders and patrons, or other persons, according to the laws and ordinances of men provided for the same. As for an example, within this realm the presentation and nomination of the bishoprics appertaineth unto the kings of this realm; and of other lesser cures and personages, some unto the king's highness, some unto other noble men, some unto bishops, and some unto other persons, whom we call the patrons of the benefices, according as it is provided by the order of the laws and ordinances of this realm. And unto the priests or bishops belongeth, by the authority of

the Gospel, to approve and confirm the person which shall be, by the king's highness or the other patrons, so nominated, elected, and presented unto them to have the cure of these certain people, within this certain parish or diocese, or else to reject him, as was said before, from the same, for his demerits or unworthiness. For surely the office of preaching is the chief and most principal office, whereunto priests or bishops be called by the authority of the Gospel, and they be also called bishops or archbishops, that is to say, superattendants or overseers, especially to signify, that it is their office to oversee, to watch, to look diligently upon their flock, and to cause that Christ's doctrine and his religion may be truly and sincerely conserved, taught, and set forth among Christian people, according to the mere and pure truth of Scripture; and that all erroneous and corrupt doctrine, and the teachers thereof, may be rejected and corrected accordingly."

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Hen. 8. for restraint of payment of annates to the see of Rome, which regarded the impediments to consecrations growing out of the alleged papal exactions, and provided conditionally for the consecrations to proceed without regard to the papal bulls where they were vexatiously delayed; and state that these provisions had been made absolute by the king's ratification of them, in consequence of the failure of any satisfactory settlement with the court of Rome. The grievances suffered from the court of Rome are presented as the mischief to be remedied, and the whole spirit and language are studiously hostile. He who in the recited statute but two years before had been our 'Holy Father the Pope,' or 'His Holiness the Pope,' is now the 'Bishop of Rome,' otherwise called the 'Pope;' and the 'Court of Rome' is changed to the 'See of Rome.'

"The recited act had made only the conditional provisions before alluded to; but had not plainly and certainly expressed in what manner, for the future, archbishops and bishops should be elected, presented, invested, and consecrated. The third section of the act therefore first takes away absolutely for the future all presentations to Rome, all procuring of bulls or pallis, or other things requisite for an archbishop or bishop from Rome, and all payments of any kind for them.

"Thus far every word in the act is directed against Rome. In the fourth section begin the positive provisions. First comes the licence under the Great Seal, 'as of old time hath been accustomed,' to proceed to an election. Here the word 'election' is used as a known term; no form is prescribed, everything is to be done in this respect as before. Then is added the new 'letter missive,' containing the name of the person whom the electoral body shall elect and choose; they are then, 'with all speed and celerity,' in due form to elect the said person named, and none other. The object of election has now been spoken of twice simply as 'the person;' no qualification of any kind has been mentioned, nor will any be found through the whole statute; and the crown lawyers are driven to contend, as they have done, that no qualification was intended, nor can any be admitted. As to canonical age, they say that a restraint on the generality of this act was created by later statutes, the statutes of Edward VI. and Charles II.; but even as to that they contend that the Crown was unfettered when this act passed; and as to every other canonical impediment, every consideration of learning, morals, and faith, is so at this moment. As I understood and I should be very sorry to misrepresent the argument of one of the learned counsel, he met the difficulty of canonical impediments by attributing to the Crown, as supreme head of the Church, the dispensing power of the Pope, and affirmed that the mere act of naming a minor in the letter missive was a virtual and effective exercise of the power. I will only say these are strange arguments to be now advanced, against which, as a member of the English Catholic Church, I strongly protest. Whether it may be that the letter missive joined to the licence to elect can be taken in such a sense to reduce the election to a mere form so as to make the act of the electors merely ministerial, and therefore to render all consideration of qualification quite immaterial, it is not necessary now to decide, and I will not take on me to affirm. I should rather think that the silence of the whole act as to qualification is to be attributed to this, that it was passed

entirely *alio intuitu*, and left that matter to be considered, as it had been before, by the proper ecclesiastical authority.

“Upon failure of an election by the delay of the chapter, the statute next authorises the Crown to nominate and present by letters patent such person as it shall think able and convenient; and, by the fifth section, the archbishop of the province, for to him alone, if there be one at the time, the nomination and presentment must be made, ‘shall with all *speed and celerity* invest and consecrate’ the patentee, ‘and give and use to him pall and all other benedictions, ceremonies, and things requisite for the same, *without using, procuring, or obtaining hereafter any bulls* or other things at the see of Rome for any such office or dignity, in any behalf.’ Here, as before, with regard to the election, the words ‘all speed and celerity’ are introduced; the consecration is to be in the ancient form, all the same ceremonies are to be used, but without procuring any authority from Rome. It is not a command to the archbishop simply to consecrate, but to consecrate ‘with all speed and celerity,’ so as not by delay to allow time for impediments from Rome to arrive, and without himself suing for or procuring any authority whatever from Rome.

“The statute then returns to the elected bishop. ‘Their election,’ it is enacted, that is, the election of the electors, ‘*shall stand good and effectual to all intents and purposes* ;’ and after certification of it to the Crown, the person elected ‘*shall be taken and reputed as lord elected*’ of the see. These are words on which great reliance is not unreasonably placed, and it would be uncandid in me to deny that I have felt their weight; but they seem to me to be inserted with a twofold view: first, to meet one of the great divisions into which the inquiry in confirmation was by the canons branched — I mean the *processus electionis*, so far as the electors were concerned and their act of election, there was to be no impeachment of their proceeding; whether the party were qualified canonically, or not, their act was good, and the party became Lord elect; and, secondly and mainly, this election was to have its virtue without the aid of any papal allowance.

“The Lord elect is then to make his ‘oath and fealty *only to the king*,’ prohibited thus from any oath of subjection to Rome; and the Crown shall signify the election to the Archbishop, requiring him to ‘*confirm the said election* :’ the words ‘speed and celerity’ are here omitted, and he is required ‘to invest and consecrate the said person so elected to the office and dignity that he is elected unto, and to give and use to him all such benedictions, ceremonies, and other things requisite for the same, without any suing, procuring, or obtaining any bulls, letters, or other things from the see of Rome for the same, in any behalf.’

“Upon this section the question turns. The archbishop is directed ‘to confirm and to invest and consecrate, and to give and use all such benedictions,’ &c. No description is given of any one of these three things. If he had asked immediately after the statute passed, ‘How invest? how consecrate?’ the answer would be, ‘As you did before the act passed, except where it specially provides to the contrary.’ If he had asked, ‘What will be the legal effects of investiture and consecration?’ the only answer would be, ‘The same as they were before.’ ‘What are my functions in investing and consecrating?’ The same answer surely must be

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given; and if the same questions were put as to confirmation, must the answers all be different? 'You were a judge before, you are a minister now; you were bound to inquire and examine before, you can do neither now; you were bound to reject one whom you believed improper for the office before, you cannot do so now.' If such answers were given, might not the inquirer ask on what words in the statute they were founded? If there were no clear words, on what strong implication they rested? And would he not be entitled to demand the strongest implication before he consented to any thing so seemingly unconscientious? or could he think any implication strong enough if he found that he was still expected to proceed in this new thing, misnamed confirmation, according to the same judicial form, and still worse with the same religious rites accompanying and seeming to sanctify it, in the house of God, as he had been accustomed to before, when it was no form, but all in substance, which it assumed to be?

"But if the words which close the sentence and refer to Rome be only held to override the words 'confirm, invest, and consecrate,' as they not unnaturally would do, not only this great difficulty is avoided, but a meaning is given to the whole which is perfectly consonant with the whole purview of the act, and, in addition, a great defect is removed from its provisions; for then it cannot be objected that the Crown may make any one a bishop — heretic, infidel, or bad liver — without reference to age, orders, or canonical qualifications of any sort. It can only do what the electoral body could have done before, however constituted, in all ages of the Church, subject only to the judicial inquiry of him on whom the Church, not the Crown be it observed, had cast the most responsible duty of consecration.

"I think it was felt in the course of the argument that, unless it was possible to separate the consideration of consecration from that of confirmation, a very great difficulty was cast upon the crown lawyers. I own I think that that separation cannot be made. I think that that difficulty cannot be removed. I would ask, then, any person of ordinary sense and conscientious feeling to read the order of consecrating bishops now, or the order of consecrating them in the time of Edward VI. nearer to the period of the Reformation, of which we are speaking, which may be taken undoubtedly not to be a whit more stringent or more solemn than the rites of the Roman Catholic Church in the same respect, and let him tell me whether it is possible to suppose that the archbishop proceeding in that function of consecration, proceeds merely ministerially.

"The seventh section follows, with its penal clauses. It is divided into three parts: first the electors for not proceeding to election, and signifying the same within twenty days; secondly, the Archbishop or Bishop for refusing, and not confirming, investing, and consecrating with all due circumstance, within twenty days after signification or presentation; thirdly, these, or any other person, for admitting, maintaining, allowing, obeying, doing, or executing any censures, excommunications, interdictions, inhibitions, or any other process or act, to the let of the due execution of the act, and their aiders, counsellors, and abettors incur the penalties of præmunire.

"In the two first cases, a time and a short time is set; and from the short-

ness of the time it is inferred, that the acts to be done must necessarily have been such in their nature as might commonly be done within those short periods. This argument, however, assumes the nature of the nonfeasance, which would bring a party within the penalties. If every, even honest, delay which overran the twenty days were conclusively a breach, there would be something in it; though even then it may well be supposed that, even as regards confirmation, the only one to which the argument applies with any force, ordinarily the process might be expected to close within that period, and as short a period as could reasonably be assigned we should expect to find allowed in an act, all through which the fear of process from Rome is most apparent. But in truth the argument falls to nothing, if in confirming the archbishop was engaged in a judicial act; for then I have no doubt that, if honestly engaged in prosecuting it without delay, he was prevented from completing it within the time by the necessary length of the inquiry, he would have a perfect answer to an indictment. The twenty days may have been quite long enough to ascertain whether he was wilfully and capriciously refusing to obey the statute, and in that sense I believe the limitation of time to have been enacted.

"I have now very imperfectly, and very hastily, though on that account at the greater length I fear, examined this statute. In the course of the argument the phrase 'Magna Charta of Tyranny,' was used with reference to it, with a personal allusion, of course perfectly understood. According to my view, this term appears to me exaggerated. The statute in that view is indeed excessive in the measure of its punishment; but that excess may well be excused with reference to the usual standards of punishment in the age in which it passed, and by considering that it did but adopt a mode of punishment which it found in the statute book, appropriated as it were to offences of a similar kind, those, namely, of improper communications with the see of Rome. It is to be remembered, that so late as in the last century only, the same punishment, with no such excuse, and only under the mad excitement of the moment, was awarded for frauds committed against the South Sea Bubble Act. But if the statute be rightly construed by the crown lawyers, then the phrase is, in my opinion, a perfectly just, a strictly measured one, not because it casts off the vexatious interference of Rome, with a somewhat rough hand, or asserts the prerogative of the Crown in the nomination of Bishops, with over-urgent severity; but because it bids freemen and Christians still to wear the garb of freemen, and use the most solemn ordinances of their religion, yet bear an intolerable yoke on their consciences, and profane those ordinances by the most bare-faced mockery; because it commands the highest officers in our Holy Church to assume the form and countenance of judges, to hold the semblance of an open court, to invite opposers, and swear witnesses on the Gospels, to pronounce a solemn sentence in the name of the Saviour, and yet tells them that all this is but shadow and sham, that they are but ministers and servants, with no more discretion as to the acts they perform, than the merest slave of the most absolute master; because, worst of all, if worse can be, it compels them to summon their Comprovincial Bishops to aid them in consecrating, no matter whom, bad liver, heretic, Jew, or Turk, in violation of their own most solemn vows, against, it may be, their own deep convictions and most ascertained knowledge; it bids them in prayer and solemn hymn to invoke the presence of the

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Holy Spirit to this monstrous prolation; in the most awful language to confer that immeasurable gift on the mocking infidel, it may be, before them, and to minister to him that rite from which on the morrow they would be bound in strictness to exclude him. And all this it bids them do, as it is said, without possibility of defence, with no plea that could be sustained in a court of justice in case of disobedience; and then strips them of the Queen's protection, forfeits their lands and tenements, goods and chattels, casts their bodies into prison for life, or during the pleasure of the Crown. As no infidel could contrive a more blasphemous mockery of religion than such a consecration would be, so it would puzzle a tyrant to invent a more cruel and disproportionate punishment. It is my consolation, and a great one it is, that I do not, and cannot so interpret the statute. I do not believe, nor shall I, until I am told so by the highest judicial authority in the land, that we have such a law under which we live. I do not believe that in any age, or under any Monarch, Lords and Commons of England would be found to pass a law with such enactments as these, under which such things could ever be possible. I cannot think that, for so many centuries, holy men should have been found, in unbroken series, content to lay on their consciences so heavy burdens. I will not admit that Henry VIII. would have given the royal assent to such a law, so understood. Tyrant though he was, strongly under the influence of passion, and ardently fond of power, so blind and inconsistent is man, he certainly thought himself a Churchman, in the highest sense of the word; he gloried personally in the title of 'Defender of the Faith;' and it was only two years before the statute in question was passed, that he gave his royal assent to another in which he asserted that 'he and all his natural subjects, as well spiritual and temporal, been as obedient, devout, Catholic, and humble children of God and Holy Church, as any people be within any realm christened.'

"But it was said that the construction of the statute which I deprecate in such strong language (language I meant not to be strong, but the simple statement of the ideas which it conveys makes it seem strong), only brings about in substance the same state of things as by law now exists in the realm of Ireland and in our colonial Church. As regards the latter, the argument is wholly unfounded; the sees have been created in the Colonies, and the bishops appointed, not under any acts of the legislature, but by the exercise of the Royal Prerogative alone, and the Metropolitan is under no statutory compulsion whatever as to the consecration; it cannot be pretended that he may not exercise an entire, though of course responsible, discretion as to the performance of that rite in any given case. And as in Ireland, the argument, to have any weight, must assume the crown lawyers' construction of the statute. If consecration be not a ministerial act under the statute of Elizabeth, but the Metropolitan is at liberty to act according to his conscience, and will incur no penalties if he only refuses to consecrate where the canonical unsuitness of the appointed makes it right and proper that he should decline; then the legal condition of the Irish branch of the Church is not in any way to be pressed as an argument against the rule, while it is obvious on the other hand, that the revival in the same year of the statute of Henry, which gave both *congé d'élire* and confirmation, and the non-revival of the statute of Edward, which had taken them away,

furnish some argument, for I do not rely on it strongly, for my interpretation.

“Upon what remains I shall say but a very few words, though it is a part of the argument very important, and as I think equally strong; I mean the form of proceeding in confirmation. Looking at the traces which may be found in the books cited, it seems to me clear that we have now effectually the same form as obtained before the Reformation; and if so, the form probably which obtained from very early ages. But the dilemma is this: either the form is thus ancient, or it obtained almost immediately after the Reformation. If the former, what weight does it not add to the whole evidence of facts down to that event? If the latter, will any one assign a plausible reason for the inventing a procedure so solemn, so judicial in all appearance, so full of religious ceremony, if the process itself were but a shadow? Will any instance be produced in history of great and grave functionaries, such as Archbishops and Bishops, setting about to contrive, or allowing to proceed, or taking part in enacting, such a ridiculous and at the same time profane mockery? I believe a parallel could not be produced.

“It was urged in the course of the argument that confirmation might be a substance, but that the form was immaterial; that it was merely the mode by which the Archbishop was to satisfy his own conscience of the fitness of the candidate; a mode, by the way, of putting the argument somewhat destructive of other parts of it in regard to consecration. Originally, the confirmation may have been uncertain as to form, but it seems early to have grown into a certain established course of procedure, and analogies will supply themselves immediately to the minds of lawyers, drawn from what has happened in regard to many of our own legal proceedings. Those forms when established by usage become binding, and the Archbishop, even if it be a mode only of informing his own conscience, must inform it now in the mode prescribed. For he, be it always remembered, is not the only person concerned; the Bishop elect, though not originally interested in the matter, and not supposed in the first place to have any personal desire to fill the great office to which he is called, as soon as he is elected, by the agreement of all parties (indeed his interest was much pressed in the argument), comes to have a direct and certain interest; he has not only a substantial and real interest, but he clearly has an interest of which the canon law took notice; because unless he had been a party to the proceeding below, he could not have become, as he appears to have done in repeated instances, the party appellant at the Court of Rome. The Church had yet more urgent rights, and justice requires that such a proceeding as this, whether in fairness to the bishop elect or in fairness to the Church concerned, should be open and governed by certain definite forms; for all lawyers must admit that it is by forms in a court of law that rights become substantially protected. If, therefore, this was in the first instance a proceeding that might have assumed any form, or at first was governed by no form at all, yet if, for at least 300 years it has taken a particular shape, that shape judicial, that proceeding carried on in open court, and parties summoned to make their appearance in that place; then according to that proceeding, by that form, and in that open court, I conceive the archbishop is bound now to proceed.

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"It was urged again, that there was a total want of instances, since the Reformation, of the rejection of any Bishop Elect; and I would rather make that admission in the fullest terms, than stand upon any of the cases about which contest was made in the course of the argument. It does not appear to me that any one of them was made out in so satisfactory a manner as to entitle the Court to found its judgment upon it. But what is the weight of the observation, after all? That it introduces some difficulty into the case, that it gives those who oppose this rule some ground to stand upon, I admit most freely, and it is an admission that I can make with perfect safety, for I am not contending that this case is altogether free from difficulties. After all, however, set against that the mere existence of the form during the whole of that time, and consider the circumstances which may very reasonably be taken into the account, to explain why there may have been no substantial appeal made, it seems to me that that argument is not entitled to very much weight.

"For all these reasons thus imperfectly expressed, not intending to pass over entirely any of the difficulties presented, and yet feeling that I have been compelled to do but little justice to some parts of this great case, it seems to me upon the whole that this Rule ought to be made absolute."

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terbury (Arch-
bishop of)*.

MR. JUSTICE PATTESON.—"I do not propose to enter into a full examination of the various passages which were cited from the works of writers on the canon law as well English as foreign, from the canons of general councils held at different times in the Christian church, and from various authors, touching the subject of confirmation of Bishops, which were very properly brought before the Court in the course of the argument. They appear to me to have established satisfactorily that in all Christian countries, in England as well as others, wherever a bishop was elected, from the earliest times until the passing of stat. 25 Hen. 8. whether by the people, by the clergy and people, by the clergy as a body without the laity, or by chapters or convents, that election required to be afterwards confirmed in order to perfect it; that such confirmation was the act of some spiritual superior, and was a judicial and not a ministerial act, one which involved an inquiry into the regularity and sufficiency of the election, and into the qualifications as well as the identity of the person elected, and coming after and by way of review of the election cannot properly be said to have been part of the election itself.

"Such confirmation was obviously most requisite in the case of a popular election, but it was also very important when the election was confined to a smaller body. Without the control afforded by it, great danger would have been incurred of the introduction of very unfit persons into the said office of bishop, the mischief of which is obvious. All Christian people were interested in various degrees in preventing such mischief; and therefore when the act of confirmation was to be performed, all persons were cited generally, as well as those who had any particular interest specially, to come forward and state their objections, if they had any, to the election. Such citation appears to have been used in this country at an early period, though the precise date does not appear, and to have been in use and well known before the time of the passing of stat. 25 Hen. 8. and to have continued to be used up to the present time: whether it was introduced into this country from the canon law, or how far the canon law

as to confirmation was adopted in this country, whether altogether or in part, I do not think it necessary to inquire. It is sufficient for the purpose of arriving at a true construction of stat. 25 Hen. 8. upon which this case depends, that before, and up to the time of the passing of that act, the election of a bishop in this country required to be confirmed by a spiritual superior, whether the pope or the metropolitan, who, anciently at all events, had the right; that it was a judicial act, and all persons were cited to come forward, which citation had been long in use.

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"Several instances of the Archbishop of Canterbury having refused to confirm elections of bishops in this country and having rejected the persons elected were cited from Wharton's *Anglia Sacra*, in which instances the objections were not merely to identity but to qualification, and the elections were annulled by the authority of the metropolitan. They were all prior to stat. 25 Hen. 8. and the elections at those times were real and free elections under a *cong   d'elire* granted by the Crown, which, however, did not state who was to be elected, and was a matter of strict right as laid down according to the statutes of this realm, having been reserved only as an acknowledgment of the foundation and patronage of the Crown when the freedom of election was conceded to the chapters and other bodies. The Crown, it is said, used to recommend some person to be elected at that time, and influenced the elections; but there was no power in the Crown to compel the election of any particular person, nor any legislative enactment restraining the freedom of elections. Therefore, the annulling of any such election by the archbishop or the pope when the act of confirmation came to be performed, could not in any way trench upon the prerogative of the Crown.

"The authorities from the Year Books, cited by the judges in the case of *Evans v. Ascuthe* in Palmer, page 470. show that confirmation was an essential and necessary act; so much so that a bishop elect was not so completely in his office before confirmation as to occasion an avoidance of any preferment that he had before; and the reason given is, because confirmation might be refused, and so the election vacated; and it is remarkable that the judges in that case, though they cited no authorities subsequent to the statute of Hen. 8. for the position, manifestly considered the prior authorities as applicable in this respect since that statute.

"Taking it, then, to be established by the authorities cited in the course of the argument, as I think it must be, that at the time of the passing of stat. 25 Hen. 8. confirmation was a judicial act, I come to consider the provisions of that act. But first I would advert to the statute of provisors 25 Edw. 3. c. 6. ss. 2 & 3. which, reciting the mischiefs arising from the bishop of Rome reserving to his collation generally and especially as well archbishoprics, bishoprics, abbeys and priories, as all dignities and other benefices, enacts, 'That the free elections of archbishops, bishops, and all other dignities, and benefices elective in England, shall be holden from henceforth in manner as they were granted by the progenitors of our said lord the king, and founded by the ancestors of other lords.' And then it goes on to say, 'And in case that reservation, collation, or provision be made by the court of Rome of any archbishoprick, bishoprick, dignity, or other benefice whatever in disturbance of the elections, collations, or presentations afore-named, that at the same time of the voidances that such re-

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servations, collations, and provisions ought to take effect, our lord the king and his heirs shall have and enjoy, for that time, the collations to the archbishopricks, bishopricks, and other dignities elective which be of his advowry, such as his progenitors had before that free election was granted; since that the elections were first granted by the king's progenitors upon certain form and condition, as to demand licence of the king to choose and then after the election to have his royal assent, and not in other manner, which conditions not kept, the thing ought by reason to resort to its first nature.' The effect of which seems to be, in case of such reservations by the court of Rome, to revest in the Crown the right of collation, in the same manner as before free elections were granted, but in the case only of such interference by the court of Rome, establishing in all other cases free elections.

"I would also advert to stat. 23. Hen. 8. c. 20. s. 2. which enacts, 'That if every person hereafter named and presented to the court of Rome by the king, or any of his heirs or successors, to be bishop of any see or diocese within this realm hereafter,' (which I apprehend to mean presented or named after free election,) 'who shall be letted, deferred, or delayed at the court of Rome from any such bishoprick whereunto he shall be so presented, by means of restraint of bulls apostolick, and other things requisite to the same, or shall be denied at the court of Rome, upon convenient suit made, any manner bulls requisite for any of the causes beforesaid, every such person so presented may be and shall be consecrated here in England by the archbishop in whose province the said bishoprick shall be, so alway that the same person shall be named and presented by the king for the time being, to the same archbishop.' Nothing is said in this statute as to the precise manner and form of carrying it into effect, with respect to bishops.

"Then follows the statute in question, 25. Hen. 8. c. 20. Now, that statute recites stat. 23. Hen. 8. c. 20. and in the preamble of the third section it states the fact, 'Forasmuch as in the said act it is not plainly and certainly expressed in what manner and fashion archbishops and bishops shall be elected, presented, invested, and consecrated within this realm and in all other the king's dominions.' Then that section enacts, that no recourse shall be had to the see of Rome; and the fourth section enacts the manner of electing a bishop in this country, and proceeds to state that the king may grant to the dean and chapter of the cathedrals a licence under the Great Seal, as of old time hath been accustomed, to proceed to election of an archbishop or bishop of the see so being void, with a letter missive containing the name of the person which they shall elect and choose, by virtue of which licence the said dean and chapter to whom any such licence and letters missive shall be directed, shall, with all speed and celerity, in due form elect and choose the same person named in the said letters missive, to the dignity and office of the archbishopric or bishopric so being void, and none other; and if they do defer or delay, 'then it provides that the Crown may appoint by letters patent.'

"Now here is an entirely new matter, as I apprehend, introduced into the proceeding of election, namely, the letter missive; because, although before that time the letter missive went by way of recommendation, it is quite clear to my mind, that that letter missive need not be obeyed, and that it was

a mere request; that there was no legislative enactment by which the chapter would be compelled to obey and to act upon it. It is here introduced, and the enactment is, that the electors shall elect the person named therein, and no other. No words are added, as in other parts of the statute, that they shall elect no other 'without suing or obtaining any bulls, letters, or other things from the see of Rome;' but it is simply, and directly, and absolutely, that they shall elect the person named, and no other.

"I cannot doubt that the effect of this is to destroy the freedom of elections altogether; to render the elections as they are characterised in the repealed statute 1. Edw. 6. c. 2., and in the Irish stat. 2. Eliz. c. 4. (1); 'in

(1) The following are the provisions of the Irish Stat. 2 Eliz. c. 4. (An Act for the conferring and consecrating of archbishops and bishops within this realm), which is now in force s. 1. "Forasmuch as the elections of the archbishops and bishops by deans and chapters within the queen's majesty's realm of Ireland at this present time be as well to the long delay as to the great costs and charges of such persons, as the queen's majesty giveth any archbishoprick or bishoprick unto and whereas the said elections be in very deed no elections, but only by a writ of *conge d'eshire*, have colours, shadows, or pretences of elections, serving nevertheless to no purpose, and seeming also derogatory and prejudicial to the queen's prerogative royal, to whom only appertaineth the collation and gift of all archbishopricks, and bishopricks, and suffragan bishops within this her highness' realm for a due reformation hereof, be it therefore enacted by the queen's highness with the assent of the lords spiritual and temporal and the commons in this present parliament assembled, and by the authority of the same, that from henceforth no such *conge d'eshire* be granted, nor election of any archbishop or bishop by the dean and chapter made, but that the queen's majesty, her heirs and successors, may by their letters patents under the great seal of England or of this realm, or the lord deputy, or other governor or governors of this realm for the time being, having instructions, letters missive, or other warrant signed by the queen's majesty, her heirs and successors, for the same purpose, may by letters patents to be made by his or their warrant under the great seal of this realm at all times when any archbishoprick or bishoprick be void, confer the same to any person, whom the queen, her heirs or successors, shall think meet, the which collation so by letters patents made in manner aforesaid, and delivered to the person whom the queen, her heirs or successors, shall confer the same archbishoprick or bishoprick, or to his sufficient proctor and attorney, shall stand to all intents, constructions, and purposes, to as much and the same effect as though *conge d'eshire* had been given, the election duly made, and the same confirmed, and that upon that the said person, to whom the said archbishoprick, bishoprick, or suffraganship is so conferred,

collated, or given, may be consecrated, and sue his livery or ouster le maine, and do other things, as well as if all the said ceremonies and elections had been done and made.

2. "And be it likewise enacted by the said authority, that every such collation to be made in manner aforesaid, if it be to the office and dignity of a bishop, shall be signified to the archbishop of the province, where the see of the same bishoprick is void; if the see of the said archbishoprick be then full, and not void; and if it be void, then to be signified to such archbishop within this realm as shall please the queen's highness, her heirs or successors, or the lord deputy, or other governor or governors of this realm, for the time being, having instructions, letters missive, or warrant signed by the queen's majesty, her heirs or successors, in manner aforesaid; and if any such collation shall happen to be made, to the dignity of any archbishop, then the same shall be signified in manner and form aforesaid, to one such archbishop, and two such bishops, or else to four such bishops in this realm, as shall be assigned by our said sovereign lady, her heirs and successors, or by the lord deputy or other governor or governors of this realm, for the time being, having instructions, letters missive, or other warrants, as is aforesaid.

3. "And be it enacted by the authority aforesaid, that whensoever any such collation shall be made by the queen's highness, her heirs or successors, or by the lord deputy or other governor or governors of this realm, for the time being, in manner aforesaid, by virtue and authority of this act, and according to the tenor of the same, that then every archbishop and bishop, to whom any such collation shall be signified, shall, with all speed and celerity, invest and consecrate the person conferred aforesaid, to the office and dignity that such person shall be so conferred unto, and give use to him, pall, and all other benedictions, ceremonies, and things requisite for the same, without suing, procuring, or obtaining hereafter any bulls, or other things, by or from any foreign authority or power, for any such office or dignity, in any behalf.

4. "And be it further enacted by the authority aforesaid, that every person and persons, being hereafter conferred, invested,

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very deed no elections, but only by a writ of *congé d'elire*, colours, shadows, or pretences of elections, serving nevertheless to no purpose.' I am citing

and consecrated to the dignity or office of any archbishoprick, or bishopric within this realm, according to the form, tenor, and effect of this present act, and suing their temporalities out of the queen's hands, her heirs and successors, as hath been accustomed, and making such oath and fealty only to the queen's majesty, her heirs and successors, and to none other, as shall be limited and appointed for that purpose, shall and may from henceforth be thronised, or installed, as the case shall require, and shall have and take their only restitution out of the queen's hands, and of all the possessions and profits, spiritual and temporal, belonging to the said archbishoprick or bishoprick, whereunto they shall be so conferred, and shall be obeyed in all manner of things, according to the name, title, degree, and dignity, that they shall be so conferred unto, and do and execute every thing and things, touching the same, as any archbishop or bishop of this realm, without offending of the prerogatives royal of this crown, and the laws and customs of this realm, might at any time heretofore do.

5. "And be it further enacted by the authority aforesaid, that if any archbishop or bishop within this realm, after such collation shall be signified unto them, in manner and form before rehearsed shall refuse, and do not invest and consecrate with all due circumstance, as is aforesaid, every such person that shall be so conferred, and to them signified, as is above mentioned, within twenty days next after the queen's letters patents, of such collation as shall come to their hands, or else, if any of them, or any other person or persons admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or any other process or act, of what name, nature, or quality soever it be, to the contrary or let of due execution of this act, that then every archbishop and bishop, and all other persons so offending, and doing contrary to this act, or any part thereof, and their aiders, counsellors and abettors, shall run in the dangerous pains and penalties of the statutes of provisors and *præmunire*, made within the realm of England, in the five-and-twentieth year of the reign of King Edward III., and in the sixteenth year of King Richard II."

Although under the foregoing statute the power of the Crown in the nomination of bishops is absolute, yet there is a case in which the Irish Church has protested against the exercise of that power.

Bishop Burnet, in his *History of his own Times* (vol. ii. p. 119.), thus relates the principal facts of the case.

"The state of Ireland leads me to insert here a very particular instance of the queen's pious care in the disposing of bishop-

ricks. Lord Sidney was so far engaged in the interests of a great family of Ireland, that he was too easily wrought on to recommend a branch of it to a vacant one. The representation was made with an undisturbed character of the person: so the Queen granted it. But when she understood that he lay under a very bad character, she wrote a letter with her own hand to Lord Sidney, letting him know what she had heard, and ordered him to call for all Irish bishops, whom she named to him, and to require them to certify to her their opinion of that person. They all agreed that he laboured under an ill fame, and, that that was examined into, they did not think it proper to promote him; so that matter was let fall. I do not name the person, for I intend not to leave a blemish on him, but set this down as an example fit to be imitated by Christian princes." To account for the circumstance that the Queen, not the King, was the principal mover in this transaction, Burnet says (vol. ii. p. 177). "The King had left the matters of the church wholly in the Queen's hands. He found he could not resist importunities, which were not only vexatious to him, but had drawn preferments from him, which he came soon to see, were ill bestowed, so he devolved that care upon the Queen," &c.

On the 9d of November, 1692, Dean Synges petitioned the Irish House of Lords against his anonymous accuser, and the following proceedings are entered under that date on the Minutes of the House.

"Resolved, on the question that the petition of Dr Samuel Synges, Dean of Kildare and Chantor of St. Patrick's Dublin, be read.

"Read accordingly; wherein the petitioner complains, that being recommended to the Queen, by the lord lieutenant, as a fit person to be Bishop of Kildare, some persons unknown had, by writing, intimated to her Majesty that he was altogether unworthy of such a promotion, and that his excellency, having received commands from her Majesty to know the opinion of certain bishops of the kingdom of his qualifications, they had certified that, since the petitioner lay under an excommunication, they conceived him not fit to be made a bishop until he had purged himself thereof, and that, in order to give him an opportunity to purge himself, his Excellency referred it to his grace the Lord Archbishop of Dublin, his diocesan, and the dean and chapter of St. Patrick's, whereof he is a member, to make inquisition into his life and behaviour, and if any thing should be objected against the petitioner, to give him opportunity to defend himself, and to certify their opinion to His Excellency. That the petitioner attended his grace there-

the words of stat. of Edw. 6. & Eliz. But I do not agree with the other part of the character given in those statutes, which says, 'seeming also derogatory and prejudicial to the queen's prerogative royal,' that is, the statute of Elizabeth "to whom only appertaineth the collation and gift of all archbishopricks, and bishopricks, and suffragan bishops within this her highness's realm." For it is plain, that before and up to the time of the passing of the stat. 25. Hen. 8., the collation and gift of archbishopricks and bishopricks did not appertain to the Crown, but they were filled up by free election, by the laws of the realm, till that very stat. 25. Hen. 8. otherwise provided in this country, and the statute of Elizabeth otherwise provided in Ireland.

"The next steps after the election are enacted in the fifth section: "And if the said dean and chapter, or prior and convent, after such licence and letters missive to them directed, within the said twelve days do elect and choose the said person mentioned in the said letters missive, according to the request of the king's highness, his heirs or successors thereof, to be made by the said letters missive in that behalf, then their election shall stand good and effectual to all intents; and that the person so elected, after certification made, shall be reputed and taken by the name of lord elected of the dignity; and then making such oath and fealty to the king, his heirs and successors, as shall be appointed for the same, the king's highness, by his letters patent under his Great Seal, shall signify the said election, if

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upon, but his grace declined the reference, declaring he knew not any person that would accuse him; so that, there being no one particular thing objected against him, he had no other way left to vindicate himself from that unjust calumny, but by this public application to this honourable house; and, therefore, prayed their lordships to consider his case, and afford him such relief, and by suchways and means, as in their judgment shall be thought fit and reasonable.

"Resolved, upon the question, that this house will retain the petition, and in case any person shall make any charge or accusation against the petitioner, they will hear the said petitioner in his vindication at the bar of this house.

"Resolved, upon motion, that the Lord Archbishop of Cashel, the Lord Bishop of Meath, the Lord Bishop of Waterford, and the Lord Bishop of Derry, may enter their dissents to this vote.

"We, the lords spiritual in parliament assembled, whose names are hereafter subscribed, having, for divers reasons then humbly offered to the House of Lords, dissented from a vote passed the third day of this instant November, for the justification of Dean Synge, before this honourable house, and having obtained leave from the said House of Lords to enter our dissent against the said vote, do accordingly subscribe our dissent from the said vote.

"NARCISSE CUSKELEN, ANTHONY
MARTIN; NATHANIEL WATERFORD
AND LISMORE; WILLIAM DERRY"

"The lords adjourn the house during pleasure."

It appears that "the evil fame," under which Dr. Synge unfortunately laboured, was not an admitted fact. The House of Lords, in the most public manner, bore the following testimony to his character.

"The house is re-assumed

"Resolved, that, in regard Dr. Samuel Synge, dean of Kildare and Chantor of St. Patrick's, Dublin, had been a considerable time personally known to all their lordships, and in their observations, has never been reputed a person of evil fame, but, on the contrary, several of their lordships gave particular instances of his good behaviour in their Majesties' service, both in his profession as a divine as also as deputy governor of the county of Kildare, — that the speaker of this house do attend his Excellency the lord lieutenant, and acquaint his Excellency, that it is the desire of this house that he will please to represent it to their Majesties, as their humble request, that neither the said private insinuation, nor the said report, may have any influence upon their royal minds in prejudice of the petitioner, until some particular be objected to him, and he may have opportunity to vindicate himself." Whether the accusation against Dean Synge was true or false, his promotion was prevented, and he died in 1708, without having been raised to the episcopal bench. Cotton's Fasti Eccles. Hib. vol. ii. pp. 112, 238.

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it be to the dignity of a bishop, to the archbishop, and metropolitan of the province where the see of the said bishoprick was void, requiring and commanding such archbishop to whom any such signification shall be made, to confirm the said election, and to invest and consecrate the said person so elected to the office and dignity that he is elected unto, and to give and use to him all such benedictions, ceremonies, and other things requisite for the same.' Then are added these words: 'Without any suing, procuring, or obtaining any bulls, letters, or other things from the see of Rome, for the same in any behalf.' Those words are added there; they are not added with respect to the election.

"The archbishop is thus required to confirm, invest, and consecrate the bishop elect, without suing any bulls, letters, or other things from the see of Rome. But he is not required in express terms to confirm and consecrate, without any inquiry or any known and accustomed forms of proceeding. The statute is silent as to the cause and form of confirmation and consecration.

'If the statute had provided that the election should be by *congé d'elire*, 'as of old time hath been accustomed,' and had not introduced the new matter of the letter missive, I apprehend that no doubt could have been entertained but that the election would have been free, and the confirmation and consecration must have been also, 'as of old time hath been accustomed,' and that the confirmation would have clearly been a judicial act; so that it will be most important to consider, what is the effect of the provisions respecting the letter missive, not only on the election, but on the confirmation and consecration. Those provisions convert the election into a virtual appointment by the Crown, preserving, however, the form of election, and making it a mere form. Do they, therefore, make the confirmation also a mere form? It is contended that they do, not by reason of the words actually used respecting confirmation, but because of the words, "then their election shall stand good and effectual to all intents;" and so the refusal of confirmation cannot effect or annul the election in any way. I am not sure that such is the meaning and effect of those words; they may mean only that the election shall stand good and effectual to all intents as an election, just as it would when the election was free; subject, nevertheless, to the same consequences of not being confirmed; but if the words mean more, and the election is to stand good and effectual although not confirmed, still the statute has made no provision for the case of a refusal by the archbishop to confirm, by authorising the Crown to direct other bishops to confirm, or in any manner whatever to perfect the election, and carry it on to confirmation and consecration; and has therefore, in some sense, left it in the power of the archbishop to render the election inoperative, though perhaps at the risk of his incurring the penalties of *præmunire*. It is surely a much more reasonable construction of these words of the statute, taken by themselves, to hold that the legislature intended the ultimate perfection and consummation of the election to depend on the confirmation, though as an election, it is made good and effectual to all intents; especially since, on refusal of the dean and chapter to elect, it is provided that the Crown shall nominate and present by letters patent, to be made to the archbishop; and that in that case the archbishop shall, with all speed and celerity, invest

and consecrate the person nominated and presented by the king. No mention is made in such case of confirmation; that is, in the case of letters patent from the king. The legislature seems to have considered that confirmation was unnecessary where there had been no election, but the Crown had nominated and presented by letters patent. And this is not an oversight, as I apprehend; for in the Irish stat. 2. Eliz. c. 4. which abolishes election, even in form, altogether, and makes the appointment always by letters patent, no mention of confirmation is made from the beginning to the end of the statute.

"Hence, however, arises another argument; and it is contended, that as the legislature treats confirmation as unnecessary where the Crown appoints the bishop directly and avowedly, namely, by letters patent, it never can have intended that confirmation should be necessary as a judicial act, where the Crown appoints the bishop indirectly and circuitously through the medium of a pretended election by the dean and chapter; therefore that the confirmation mentioned in the statute must be taken to be a ministerial act, and a mere form, that the form of confirmation was preserved because the form of election was; but neither was intended to be real or more than shadow.

"It is difficult to see why confirmation should be necessary where the Crown appoints indirectly, if it was not considered so where the Crown appoints directly, and if it was right to omit it in the one case, why it was not right in the other. It is vain to conjecture the reasons which actuated the legislature at that time, and I do not pretend to reconcile or to account for all the provisions of this statute. Looking at the words used, I see nothing which imports that the confirmation and consecration were to be mere ministerial forms and shadows; they are both required in one and the same sentence, and in the same language. I cannot bring myself to believe that the legislature of this country could ever intend that the solemn act of consecration should be a mere form and shadow; and if not, neither can confirmation be so, for one and the same interpretation must be put on the language which is applied equally to both. As to consecration, indeed, no previous form of inquiry is stated to have been used, like that in the case of confirmation; nor am I prepared to say that any was necessary. The archbishop, where he had confirmed would have already inquired, and where after this statute (which would rarely happen, indeed, no instance has been cited in which it has ever happened) the Crown appointed by letters patent in default of election by the dean and chapter, he would in general be able to inform himself, without any public inquiry, as to the qualifications of the person nominated and presented by the Crown; and if any lawful impediment to the consecration came to his knowledge, I cannot believe that the legislature intended to force him, knowingly and without regard to such impediment, to perform the solemn act of consecration.

"The statute, as I have already observed, directs letters patent from the Crown, requiring the archbishop to confirm the election, and consecrate the person elected, without suing or obtaining any bulls, letters, or other things from Rome. The confirmation and consecration contemplated by the legislature seem, therefore, to be such, those words being added,

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'without obtaining any bulls,' as would formerly have required to be sanctioned by bulls from Rome, and as would be directed by such bulls; and can it be doubted that the bull for confirmation would have directed a judicial act?

"I am compelled in construing this act, either to suppose, without any express words to warrant that supposition, that the legislature meant to carry the form and shadow which by express enactment was introduced into elections, also into confirmation, or that it meant to require confirmation as a judicial act, such as it was before the statute, where there was a form of election, where the appointment by the Crown was through the medium of that form, although it did not require it where the appointment by the Crown was direct. I cannot feel myself justified in attributing to the legislature the enactment of mere form, shadow, and pretence, beyond what the very express words compel me to do; and I feel bound to construe the words which are used according to their known and received meaning, if by so doing no contradiction or absurdity is involved; especially if such construction be, as I think it is, more reasonable, though I cannot altogether explain the reason of the distinction—as to where confirmation is required and where it is not.

"It seems to me, therefore, that the archbishop is required by the fifth section to confirm the election, to use the words of the fourth section, "as of old time hath been accustomed;" that is, in a judicial course and with proper inquiry.

"But the seventh section containing the penalty of præmunire against the dean and chapter, for not electing and signifying the same within twenty days, and against the archbishop, for not confirming and consecrating within twenty days, "or else, if any of them, or any other person or persons admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or any other process or act of what nature, name, or quality soever it be to the contrary, or let of the due execution of this act," remains to be considered I would observe first, that I do not think this clause at all affected by stat. 1 Eliz. c. 1. s. 32. which was referred to in the argument. It seems plain to me that that section in 1 Eliz. c. 1. operates only to prevent the repeal of the stat. 1 & 2 Ph. & M. c. 8. s. 10., which enacted the penalty of præmunire against persons attempting to disturb the grants made by Henry VIII. of the lands of monasteries, and has no bearing on the present question.

"It has been much doubted whether this penalty in the seventh section applies at all, except where something is done or omitted to be done, in consequence of communication with the see of Rome. As far as regards the latter part of the clause as to admitting censures and so forth, I see much reason to think that doubt not to be without foundation; for it is observable that all the words used are indicative of processes not used in our courts of law, but in the canon law and the ecclesiastical courts. But I do not think it necessary to determine that point; for I think the language of that part of the section clearly applicable only to some extrinsic coercion used by another, whoever that might be, towards the dean and chapter or the archbishop, and submitted to by them, and not to the exercise of any jurisdiction or authority of their own which they might lawfully have, and I have already stated that I think the archbishop has lawful authority and

jurisdiction to act judicially, in regard to confirmation under the provisions of this act.

"With regard to the earlier part of the clause, the words at first sight seem to import that the penalty is incurred absolutely, if the archbishop shall refuse and do not confirm and consecrate within twenty days; and in argument these words were brought to bear upon the construction of the fifth clause, because it was said that a judicial inquiry could not be conducted in so short a time as twenty days in most cases, and therefore that no judicial inquiry could be intended. I do not think that the words here used necessarily lead to any such consequence.

"It is observable that in the fifth section which empowers the king to send his letters patent to the archbishop, requiring him to confirm and consecrate, nothing is said about the time of confirming and consecrating; it is only said that the king shall by his letters patent signify the election to the archbishop, requiring him to confirm and consecrate (it is not even said with all speed and celerity, as it is in the case of letters patent nominating and presenting), without suing to Rome for bulls. Whether that is a mere oversight or not, I am sure I cannot tell; but certain it is in this statute, where there has been an election by the dean and chapter, and where there are letters patent directed to be sent from the Crown requiring the archbishop to confirm, it does not say, 'with all speed and celerity,' or within any time; but it goes on to say, 'if the dean and chapter shall refuse, the Crown shall appoint by letters patent,' rather I should say, it shall direct letters patent to the archbishop, requiring him to confirm and consecrate with all speed and celerity. The seventh section then enacts the penalty, if the archbishop shall refuse and do not confirm within twenty days. I apprehend that the true meaning is, if he shall refuse, and do not confirm within twenty days, without lawful cause. All statutes enacting penalties must be construed strictly; and whenever a penalty is attached to the refusal to do any act, be it judicial or ministerial, I apprehend that the refusal must be without lawful cause or excuse, the proof of which may perhaps lie on the party refusing, but which being proved, would be an answer to any proceeding for the penalty. What would amount to lawful cause or excuse, in the case of the dean and chapter, it is unnecessary to inquire; but it seems to me that in the case of the archbishop, the pendency of a judicial inquiry, if it be such, supposing I am right in saying it is a judicial inquiry, would be lawful excuse, as regards the delay beyond the twenty days, as much as illness, either of the archbishop or the bishop elect; and a *bond fide* decision of the unfitness of the person elected after judicial inquiry, would be lawful cause, as regards an ultimate refusal to confirm. If, therefore, I am right in my construction of the other parts of the statute, and confirmation be a judicial act, I cannot see any thing in the seventh clause which should prevent its being so, or subject the archbishop to the penalty therein contained, if he proceeds *bond fide* in regard to that judicial act.

"It is said that so to construe the statute would be in violation of the prerogative of the Crown. I cannot feel that it is so; the prerogative of the Crown remains just as it was, in regard to what is to take place after election, though by the letter missive the power of the Crown in the election itself is materially altered. The construction which I put upon the statute,

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does not derogate from, or diminish the prerogative of the Crown, but only does not extend it. Neither does this construction give the archbishop a veto to the appointment by the Crown; it only leaves him to exercise his spiritual duties as to confirming and consecrating in the ancient manner, and as in their very nature they ought to be exercised.

"Again, it is said that no instance has occurred of refusal to confirm since the statute. That is a circumstance of considerable weight, and if the proceedings towards confirmation used before the statute had been dropped immediately after it, I should have thought that a contemporaneous exposition which would have gone very strongly to show that confirmation was intended by the statute to be a mere ministerial act; but the contrary is apparent, and that for some time after the statute upon the proceedings towards confirmation, witnesses were examined (1), and a regular inquiry gone into upon some occasions, although in modern times no such instances are cited. The disuse of an authority or power which any court by law has, will not destroy that authority or power, as conceded in *Ashford v. Thornton*. (2)

"The opinions of various writers collected in a recent pamphlet (3) were referred to in the course of the argument, by the counsel for the prosecutors of this writ. So far as they go they appear to me to afford an inference that the general notion was, that the archbishop was bound to confirm under the penalty of præmunire. In Brett on Church Government it is distinctly so put; that was one of the passages which Dr. Addams cited (4);

(1) Vide copy of the record of Archbishop Parker's confirmation and consecration, from the Lambeth Register printed, 3 Bramhall's Works, 179. 203. Oxford, 1844.

(2) 1 B. & A. 405.

(3) The pamphlet alluded to by the learned Judge, is entitled "The Royalty of the Crown in Episcopal Promotions, according to the Judgment of Divines, Canonists, and others of the Church of England," 2nd Ed. Lond. Rivingtons, 1847.

(4) The following is the extract referred to.—"As princes were the endowers of Episcopal Churches, all the temporalities of bishops being held in capite of them, so they nominated bishops to supply vacancies as they should happen; but the Metropolitan and his comprovincial bishops always appointed them to their office, and consecrated them. And so it is at this day in this realm. Wherefore tho' the nomination be in the prince, the appointment to the duty or charge is in the metropolitan and the comprovincial bishops, and their spiritual authority is as much derived from them as ever it was.

"I have already showed in the beginning of this book that all spiritual authority must be derived only from Christ, who is the sole supreme head of the whole Church; that he delegated no authority to the magistrate in spiritual matters, but to his apostles, who exercised it not only without a licence from, but sometimes even in opposition to the civil powers; that the apos-

tles committed the same authority to their successors, the bishops and pastors of the church, with whom it continues to this day; and with whom, according to our Saviour's promise, it shall continue to the end of the world. And their appointing a person to the episcopal office nominated to them by the prince, is no more an argument that that person does not receive his spiritual power from them, than it is an argument that the deacons did not receive their power from the apostles, because the people chose them. It is one thing to choose or nominate, and another to confer the power. The patron of a church may give a friend leave to nominate a clerk to him, nay, some body may have such a right upon the patron, that he shall not dare refuse to present the clerk that person nominates, yet it is not the nomination, but the presentation that empowers that clerk to go to the bishop for institution. Now such a tie our princes have on the chapters which elect, and on the metropolitan and bishops that consecrate a bishop, they dare not refuse to elect and consecrate the person nominated under the penalty of a præmunire, yet it does not therefore follow he receives his spiritual authority from the prince, for if the prince could give that, why should he send him to the bishops for consecration? If this author could show that our princes might make bishops by their letters patents only, without any consecration at all, he would speak, indeed, in

and in Mason's *Vindiciæ Ecclesiæ Anglicanæ*, the answer to a supposed question what is to be done, if the king, being deceived, appoints an unfit

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the purpose. If he could prove that a royal commission would make a bishop, or that it ever did so, as fully and completely as it can make a civil officer, then, indeed, it would be a proof that the episcopal power is wholly derived from the regal. But to say that the prince can compel the bishops by his temporal authority to consecrate whomsoever he shall nominate, is no more than to say that all bishops are subject to the temporal power, and that the civil magistrate has authority to punish them if they disobey the temporal laws. There being therefore an act of parliament which obliges the bishops to consecrate the person nominated to a bishopric by our sovereign prince, under a severe penalty, it is not to be wondered that our bishops have always complied to do so. And yet if any prince should nominate a person wholly unfit and unqualified to exercise the episcopal function, the metropolitans and other bishops ought rather to incur the penalty than to consecrate such a person. And the most that can be said is, that this is a right of patronage vested in the supreme magistrate extended something beyond the bounds of what was allowed in former ages, because the clerks presented by all Patrons ought to be tried and examined, which is not allowed here. However, this shakes not the fundamentals of church government, and howsoever the person is nominated by the prince, yet the archbishop and bishops must lay their hands on him, and invest him with the spiritual power. It is they that actually give him his commission for the work of this ministry, saying, Receive the Holy Ghost for the office and work of a bishop in the Church of God, now committed to thee by the imposition of our hands, &c. By which it is evident that he receives his authority from their commission, and not from any commission from the prince, for they tell him at his consecration, that it is now committed to him by the imposition of their hands; a sure testimony that our law conceives him to have no such authority before, notwithstanding his nomination by the prince; for this form by which the bishops consecrate is confirmed by an act of parliament as well as the prince's right of nomination. And if the bishops should refuse to consecrate him, the parliament neither has declared, or, indeed, can declare, that he shall be a bishop without it. They have appointed a severe penalty in case of refusal, but they are sensible it is no more in their power to make a bishop than 'tis to make a christian.

"As to what he says, that the bishops cannot act in their own right, or by a power inherent in themselves dispose of the power of the deceased bishop, as upon his death

devolving to them; because the power of the deceased bishop devolves to the people, to be disposed of by them, or by an authority derived from them. (For this gentleman places all authority in the people, and makes the magistrate no more than their trustee.) In this case he is plainly out as to matter of fact; for according to the constitution of this realm, as the temporalities of a deceased bishop devolve to the Crown, so the spiritualities devolve to the metropolitan, or, in case the metropolitane see be vacant, to the dean and chapter of the metropolitane church, and they are the guardians of the spiritualities of every church in this realm, so long as it continues vacant. So that even according to this gentleman's own argument, if they to whom the power devolves have the right to transfer it on another; then since the spiritual right of the deceased bishop is in fact devolved on the metropolitan, it is he that must have the right to transfer it to the successor. And, though the prince nominate that successor, yet he sends him to the metropolitan to be confirmed and consecrated. And tho' the king or queen may in default of the Archbishop, or if the archiepiscopal see be vacant, appoint other bishops, three or four (not any single bishop, as this gentleman says, for the statute expressly says, an archbishop and two other bishops, or else four bishops) this makes no material difference in the case; for all bishops, besides the care of their own particular churches have a general right to see that the Catholic Church be duly provided with its proper officers; and where the presbytery of a church, which we now call the dean and chapter, have signified to their neighbouring bishops that they wanted a pastor, those neighbouring bishops have consecrated one for them. All the difference therefore between what the bishops did originally and what they do now is, that now they are liable to temporal penalties if they have not a royal commission for that which in the primitive church they might do without one. The prince's commission plainly gives them no spiritual authority, but only authorizes them to execute that authority within his dominions, in such manner as may exempt them from the penalty of the temporal laws. But 'if the civil magistrate shall abuse his temporal authority by preferring unqualified persons when he nominates to a bishopric, the bishops whom he orders to consecrate such a person ought to suffer any penalties rather than to obey him. And if no bishops will consecrate such a person, no temporal authority whatsoever can make him a bishop. And therefore, notwithstanding this right which our princes exercise in nominating to vacant bishoprics, enjoying and

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person, is, that on representation to the king, no doubt he would appoint another, whereas it would have been a ready answer to have said the archbishop will refuse to confirm, if it had been thought by Mason that he had the power (1). If it is meant to be inferred that, from the time of the

commanding elections and consecrations, yet our bishops do not derive their sacerdotal power of consecration from our kings and queens in the same manner as civil officers derive their authority from them, merely by virtue of the royal commission. For the royal commission alone will make a civil officer, but a bishop was never so made within this realm, or can be so otherwise than by having the episcopal power committed to him by other bishops." Brett on Church Government. Lond. 1710, cap. xxi. pp. 429—434.

(1) The passages in MASON (*Vindiciæ Ecclesiæ Anglicanæ; or, Vindication of the Church of England, and of the lawful ministry thereof, i. e. of the Succession, Election, and Consecration of Bishops.* Lond. 1625. Translated into English by John Lindsay. Lond. 1734, book iii. c. 7. p. 278.) to which allusion is made are as follow:—

"The objections of the papists, that our bishops are the Queen's bishops, and parliament bishops, answered in general, by explaining our method of making bishops.

"PHILODOXUS (a priest of Rome). — Your new pretended bishops (as Scultingius saith) derive their counterfeit authority, not from lawful consecration, or catholic inauguration, but from the Queen and parliament. (Sculting. Bibl. Cath. l. i. 5. p. 106.). They are therefore properly styled by Sanders. (Sand. de Schism. p. 348.) the Queen's bishops, (Ibid. p. 349.) and parliament bishops. For (as Bristow relates) in England the King, yea and the Queen, grants letters patent to whom they will; and they thenceforth bear themselves for bishops, and begin to ordain ministers. (Brist. Antihar. motiva, p. 264.) Hence Bellarmine had reason to say, that in Queen Elizabeth's time there was a woman pope in England. (Bellarm. De Notis Eccles. b. 4. c. 9. s. 4., Peputiani hæretici, &c.)

"ORTHODOXUS (a priest of the Church of England). — These saucy shameless papists proclaim aloud, that the bishops of the Church of England derive not their orders from bishops, but from kings and queens. (See a Collection of their Calumnies, book 1. c. 2. fol. 8. &c.) A monstrous lye, and an impudent slander! For our kings do that only which belongeth to the office of kings, and our bishops to that of bishops. For 'at every avoidance of any archbishoprick or bishoprick, the King grants to the dean and chapter of that church a licence under the great seal of England (which is commonly called the congé d'eslire) to proceed to election, with a letter

missive (as it is call'd) containing the name of the person which they shall elect and chuse. Then the electors do certify under their common seal (the election to be duly performed) to the King (humbly beseeching him to grant his royal assent thereto). The King (giving his assent to their election) signifieth the same to the archbishop and bishops, requiring and commanding them by his royal authority to confirm the said election, and to invest the said person so elected, and to give and use to him all such benedictions, ceremonies, and other things requisite for the same.' After this, the archbishop and bishops, following the example of their predecessors, take care publicly and peremptorily, to cite all manner of persons, who have any thing to say or object, either against the form of the election, or the person elected, in general, or particular, personally to appear before them. And when it appears solemnly, and judicially, by public acts, both that the election is valid, and the person elected of sufficient learning and probity, then at last follows the consecration; which is performed by a competent number of lawful bishops, according to the direction of the ancient canons. 'This is the solemn and constant method of making bishops in England.' (IDEM, b. iv. c. 13. p. 431, 432.)

"PHIL. — You pretended to treat of kings electing bishops, and conferring of bishopricks: and now you ascribe not the election to kings, but to the clergy, and claim only nomination for kings.

"ORTH. — The King's nomination is with us a fair beginning of the election. Therefore, when he nominates any person, he elects him, and gives, as I may say, the first vote for him.

"PHIL. — What kind of elections are these of your deans and chapters? 'Tis certain, they can't be called free elections, since nothing is to be done without the King's previous authority.

"ORTH. — The freedom of election doth not exclude the King's sacred authority, but force and tyranny only. If any unworthy person should be forced upon them against their wills, or the clergy should be constrained to give their voices by force and threatening, such an election cannot be said to be free. But if the King do nominate a worthy person according to the laws, as our kings have used to do, and give them authority to choose him, there is no reason why this may not be called a free election. For here is no force, nor violence us'd.

"PHIL. — But if the King, deceived by undeserved recommendations, should happen

statute, the received opinion was that confirmation had become a mere form it must have been known to all the different archbishops and their vicars general, and it is difficult to understand why the proceedings at confirmation were not altered in their form, so as to suit the altered nature of the act of confirmation itself. If it was known to be a ministerial and not a judicial act, then, from the time of the statute to this day, a solemn mockery has been knowingly gone through at every confirmation, the whole forms of which are assuredly those of a judicial and not a ministerial act. Too much stress ought not to be laid on the use of particular forms; but every one who reads the account of the proceedings on confirmation given by Bishop Gibson in his Codex, and which confessedly have been constantly used, and were used on the present occasion, cannot but see that the citations, the *summarius petitio*, the decree itself, and all the steps which I need not detail, have the appearance, at least, of a judicial and not a mere ministerial proceeding. It is difficult to believe such a continuance of mockery and deception by so many and such persons, and for such a length of time, without, as it seems to me, any assignable motive. I cannot but think, therefore, that confirmation was not altered in its nature according to received opinion, but remained as before; and that the want of exercise of the right of refusal was from the necessity of so doing not arising.

"Instances are mentioned of Dr. Rundle (1) and Dr. Samuel Clark (2) in

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to propose to the clergy a person unlearned, or of ill morals, or otherwise manifestly unworthy of that function, what's to be done then?

"**ORTH.** -- Our kings (*Philodox*) are wont to proceed in these cases maturely and cautiously; I mean, with the utmost care and prudence; and hence it comes to pass that the Church of England is at this time in such a flourishing condition.

"**PUR.** -- Since they are but men, they are liable to humane weakness: and, therefore, what is to be done, if such a case should happen?

"**ORTH.** -- If the electors could make sufficient proof of such crimes or incapacities, I think, it were becoming them, to represent the same to the King with all due humility, modesty, and duty; humbly beseeching his Majesty, out of his known clemency, to take care of the interest of the widowed church. And our princes are so famous for their piety and condescension, that, I doubt not but his Majesty would graciously answer their pious petition, and nominate another unexceptionable person, agreeable to all their wishes. Thus a mutual affection would be kept up between the bishop and his church.

"Thus I have showed you, that our kings have had a singular prerogative in the election of bishops: and now I am to prove that they had the same lawfully. And that will be manifest enough, whether we consider the kings themselves, or the bishops. This privilege belongs to kings by a twofold right; to wit, in right of their sovereignty and in right of their patronage."

(1) The see of Gloucester having become vacant in the year 1734, Dr. Thomas Rundle, then master of Sherborne Hospital and prebendary of Durham, was recommended to George II. by Lord Chancellor Talbot, for promotion to the vacant bishoprick. Dr. Rundle, it seems, had been an intimate friend of the celebrated Whiston, whose heterodox opinions were well known; and it was alleged, also, that he had himself uttered some sceptical sentiments in the presence of Mr. Venn, who afterwards reported the conversation. Upon these grounds Bishop Gibson strongly resisted the appointment of Dr. Rundle; and although the objection was made by a single bishop, its validity was admitted, and Dr. Rundle's nomination was set aside, and the bishoprick conferred upon Dr. Benson.

(2) The following observations respecting the case of Dr. Samuel Clark will be found in "The Parallel; or Vindication of Archbishop Wake for his opposing the promotion of Dr. Samuel Clark to a bishoprick." (Lond. 1735. p. 4.)

"The reflections made by him, you will find, are not singular, but against all who are of the same Church of England principles; I thought it therefore not improper to take it in the present view, for though his grace (Archbishop Wake) be not once mentioned, and possibly not intended to have been reflected on in particular, yet his arguments, if they have any weight or influence, though principally levelled at another, must, in the consequence, hurt his grace's character, whose pious labours and steady adherence to the principles and doctrine of the Church

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which another course was taken to prevent their being appointed, and that was a respectful and proper course, in order to avoid the necessity of any refusal by the archbishop; and in the reigns of Charles II. and William III. the Crown by its own act directed that commissioners should be consulted in the choice of bishops, which would obviate any difficulties. It seems to me, therefore, that no sufficient light is afforded by the events since the statute, to show that it really was intended to have the effect of altering the nature of confirmation, which is contended for, or which would justify me in putting a different construction on that statute from that to which a consideration of the words of it has led me.

"It is said that confirmation cannot be a judicial act; because the archbishop acts in it by his vicar general, whose office does not give him jurisdiction in contentious suits. I do not see that this alters the case. *Præsumptæ* confirmation would not be contentious, and therefore the vicar general would be a proper officer by whom the archbishop might act; but it does not follow that, if the proceedings became contentious, the archbishop would be deprived of his authority, because of the usual nature of the office of the person by whom he is acting; that office is described in Oughton's Prolegomena, xvi., which was referred to by one of the learned counsel; the words are remarkable because he says, 'Ea quæ contentiosæ jurisdictionis erant non exercebat, id est causarum inter partes in foro contradictorio decisionem.' And then it is put in a parenthesis 'Præterquam eaquæ pro forma solummodo ventilantur, utpote negotia confirmationis episcoporum, electionis, et similia,' then after that parenthesis, 'Sed ea quæ sunt officii meri gerebat.' This very passage, to my mind, conveys the idea that confirmation is not officii meri, namely, ministerial, but in its nature judicial, though usually pro forma. Neither can I doubt, that if the archbishop be acting judicially in the matter of confirmation, he would have the same power of compelling the attendance of witnesses that any other court of ecclesiastical jurisdiction has; I do not lay stress on Dr. River's supposed opinion in the case of Bishop Montagu, opposed as it appears to be, if it were given, by the opinion of Sir James Marriot, which was handed up; but the facts which then occurred, militate against the supposition that the citation of opposers at confirmation was generally known to be a mere shadow, and so do the observations of the judges in *Evans v. Ascuthe*, to which I have already adverted.

"There is a passage in Bishop Godwin's work, which was also referred to in the course of the argument, and which seems to throw some light upon

of England in the most dangerous times, whose hearty zeal for the Protestant succession in the present Royal Family, his tender compassion for scrupulous consciences and universal benevolence towards all mankind, with an abhorrence of persecution upon account of religion, made him worthy of and raised him to that high post which he has filled with so much honour; and yet, who without the least diminution of his great character, or hurting the cause of liberty, as a faithful counsellor to his sovereign, a diligent pastor of his church, a

friend to the peace and quiet of the kingdom, gave a strenuous opposition to the promotion of Dr. Samuel Clark to a bishopric, by reason that he was suspected of some unhappy errors in points of religion, inconsistent with the doctrine of the Church of England, and the true faith of a Christian; notwithstanding that his great learning and probity, his pious example, his labours in support of religion in general against atheism and infidelity, had gained him the friendship, and even the recommendation, of many of high rank."

this subject, in his works, *De Præsulibus Angliæ*. In the *Life of Montague*, at page 443, he says, 'Illud autem memorabile accidit eo die quo in Ecclesia Beatæ Mariæ de Arcubus juxta solemnem citationis formam episcopi jam jam confirmandi mores laicorum quoque examini subjiçiantur adfuisse, qui eum Arminianismi nescio cujus reum et adeo Pontificiis faventem accusarent, eaque de causa episcopatu prorsus indignum rejicerint. Verum cum calumnias potius quam argumenta proferri videantur, subsecuta est aliquandiu impedita confirmatio.' This passage seems to treat the citation as a real, not a mock proceeding. It appears to me also that what occurred in the *case of Bishop Montague* (1) must have drawn much attention to the proceedings upon confirmation; and that the citation would have been then discontinued if it had been thought to be a mere mockery, and that the archbishop could lawfully omit it, much more if, as is now contended, he was precluded by the statute of Henry VIII. from giving any effect to it, and indeed from making any inquiry. It is not as if no such question had ever arisen; but when it did arise in the *case of Bishop Montague*, I cannot account for the continuance of the citation afterwards, if it was considered really to mean nothing at all.

"In the course of the argument a statute of Henry V. (2) was cited from

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(1) The following is an extract from Fuller's Church History (book xi. 67, et seq.), respecting *Bishop Montague's case*, A. D. 1628. — "Mr. Richard Mountague, one of a different judgment, succeeded to this see, who at first met with some small opposition on the following occasion. —

"There is a solemnity performed before the consecration of every bishop, in this manner. The royal assent being passed on his election, the archbishop's vicar-general proceeds to his confirmation, commonly kept in Bow church. A process is issued forth to call all persons to appear, to show cause why the elect there present should not be confirmed. For, seeing a bishop is in a manner married to his see (save that hereafter he taketh his surname from his wife, and not she from him), this ceremony is a kind of asking the bishops to see if any can allege any lawful cause to forbid them. Now at the confirmation of Mr. Mountague when liberty was given to any objectors against him, one Mr. Humphreys (since a parliament colonel, lately deceased), and William Jones, a stationer of London who alone is mentioned in the record), excepted against Mr. Mountague, as unfitting for the episcopal office, chiefly on this account, because lately censured by parliament for his book, and rendered incapable of all preferment in the church.

"But exception was taken, at Jones's exceptions (which the record calls *pretensiones articulos*), as defective in some legal formalities. I have been informed it was alleged against him, in bringing on his objections *viâ voce*, and not by a proctor, that court adjudging all private persons effectually dumb, who speak not by one admitted to plead therein. Jones returned

that he could not get any proctor, though pressing them importunately, and proffering them their fee, to present his exceptions, and, therefore was necessitated *ore tenus* there to allege them against Mr. Mountague. The register (*Registrum Cantuar.* fol. 140. in anno 1628.) mentioneth no particular defects in his exceptions; but Dr. Rives (substitute at that time for the vicar-general), declined to take any notice of them, and concludeth Jones amongst the contumacious, *quod nullo modo legitime comparuit, nec aliquid in hac parte juxta juris exigentium dicere, exciperet, vel opponeret*. Yet this good Jones did Bishop Mountague, that he caused his addresses to the king to procure a pardon, which was granted unto him, in form like those given at the coronation, save that some particulars were inferred therein, for the pardoning of all errors heretofore committed, either in speaking, writing, or printing, whereby he might hereafter be questioned."

(2) *L'ordonnance par les Esclixas Evêschens durant la presente voidance del see papale.* —

"Nostre Seigneur le Roy, aiant consideration a la longue voidance de la see Apostolique par la dampnable seisme q'ja longement ad endure en Sainte Eglise, & l'em ne sciet unjore cumbien s'endurera, & coment certains Eglises Cathedrales deins son Roialme, q' sont de la fondation de ses nobles Progeniteurs & de son patronage, ont este ja piecea, & sont uncore destitutz de pastorels governance, a cause que les personnes q' sont escliz a ycelles, ne purrount estre confermez es parties de dela, par defaute d'Appostoli, combien que nre dit Seigneur le Roy sur ceo ait ottoie son roial assent, en graunt dummition de divine service es dites Eglises, subtraction d'ospitalitees,

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the rolls of parliament, which is not found in the common collection of the statutes, and which, after stating the schisms and disputes respecting the election of the pope, and that in truth the apostolical see was void, describes the mischief in this country from the inability of persons who were elected bishops to obtain confirmation, and enacts that whilst the apostolical see is void, the archbishop shall confirm the persons so elected bishops, so as the king assents; and it provides for the king's writ to them for that purpose, which is nearly, if not entirely, in the same form as that directed by stat. 25. Hen. 8. requiring it to be done with celerity, and that the archbishop should do all things canonically necessary. The writ is to be found in Rymer's *Fœdera*, (1) and proceedings under the statute are to be found in

tres grands peril des almes de plusieurs, devastation & destruction des Seigneuries & possessions d'icelles, & empoverissement des eslizs des ditz Eglises; & coment par possibilitée en tel maniere puissent voidier toutz les Eglises Cathedrales de son dit Roialme, & issint estre destitutz de gouvernalle, & le Roy & son Roialme, du Conseil, Comfort, & Aide, qu'il deusse avoir de la Prelacie, & considerant auxint coment en plusieurs parties de delà, depuis la voidance du dite see, diverses confirmations ont esté faites, & ceo sont de jour en autre, par les Metropolitans des lieux, sicome creablemet il est enforme, & vaillant pur tant pur ouster les ditz meschiefs purvoier, come appent, de remede, de plein & deliberat avis & assent des Seignurs & Communes de son Roialme esteantz en cest present Parlement, voet & ordeigne, que les personnes issint eslizs & a eslizs, deinz son Roialme, durante la voidance du dite see Apostolique, soient confermez par les Metropolitans des lieux, sanz excuseation ou outre tarier en cele partie a faire, & que les briefs du Roy, s'il besoigne, soient adressez as ditz Metropolitans, leur estreitement enchargeantz de faire les ditz confirmations, & tout ceo q'i leur office ent appent; & auxint as ditz eslizs, qu'ils devers eux effectuellement pursuyent leur ditz confirmations; issint q'en defaute des ditz Metropolitans, ou eslizs, damage ou prejudice n'aviegne a fire dit Seigneur le Roy, & a son Roialme, & a lez ditz Eglises, pur l'eschecous desuz ditz, que Dieu ne voille." *Rot. Parl.* 3 Hen. V. pars 2. m. 11.

(1) Tom. 4. Pars. 2. p. 156. Ed. 1740. The second of the two writs following is the writ in question, being preceded in Rymer's *Fœdera* by the first.

"Rex, dilecto Clerico suo, Johanni Waker-
yng Archidiacono Cantuariensi, Salutem.

"Sciatis quod,

"Cum Nos nuper Electioni, de Persona vestra factæ, in Ecclesia Cathedrali Sanctæ Trinitatis Norwici, in Episcopum loci illius, regium assensum adhibuerimus et Favorem,

"Ac Nos jam, considerantes diutinam Vacationem Sedis Apostolicæ, quæ propter dampnabile Scisma à diu in Ecclesia Catholica perduravit, et incertum est quamdiu durabit,

"Ac certæ Ecclesiæ Cathedrales infra Regnum nostrum Angliæ, quæ de Fundatione Nobilium Progenitorum nostrorum, quondam Regum Angliæ, et Nostræ Paternatæ existunt, Pastoralis Gubernatione destitute extiterint et existant, eo quod Personæ, ad easdem Electæ, in Partibus Fœderis, pro carentia Summi Pontificis, confirmationem minime poterant quantum Nos Assensum nostrum Regium super hoc factum contigit, in Divini Obsequii Ecclesiæ, necnon Diminutionem, necnon Hospitantium distractionem, ac Animarum Periculum, tam modica, et Dominiarum ac Possessionum eorumdem Vastationem et Destructionem, necnon Electorum Ecclesiarum earum Depauperationem, manifestas,

"Ac singulis Ecclesiæ Cathedrales ejusdem Regni nostri sic per possibilitatem sacre possent,

"Per quod ipsæ Gubernatione, ac Non a regnum nostrum Consilio, Patro, et Consultatione, quæ de Prelatis iniquitatis haberemus, destitueremur,

"Attendentes etiam qualiter, in pluribus Locis Transmarinis, postquam Sedes Apostolica sic vacavit, quæ plures Confirmationes per Metropolitanos Locorum factæ fuerint, et indices factæ existunt, prout certammodo informamur,

"Ac volentes prout Remedium salubrem in hac parte,

"De pleno et deliberato Assensu et Assensu Dominorum Regni nostri presentis, et Communitatis ejusdem Regni, nostrum Parlamento nostro existentium, Volumus et Ordinaverimus quod Electi, in electis, et eligendis, infra dictum Regnum nostrum, (Vacatione dictæ Sedis Apostolicæ durante) per Metropolitanos Locorum, absque excusatione vel dilacione in hac parte faciendis, confirmantur,

"Et quod Brevia nostra, si necesse fuerit, eisdem Metropolitans, ipsos distraxisse ad hujusmodi Confirmationes, et omne id quod ad Officium pertinet in ea parte, faciendum operando, dirigantur,

"Et similiter Electis hujusmodi, quod ipsi Confirmationes ipsas versus ipsos Metropolitanos prosecuantur cum effectu, ita quod, pro defectu dictorum Metropolitano-
rum, aut Electorum presentium, dampnum vel Prejudicium Nobis, aut hujus

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Wharton's *Anglia Sacra* as to the consecration of a bishop of Norwich in 1416, at which all opposers were cited in the usual way. It is true that there are no penalties in the statute of Henry V., but it directs the archbishop in quite as positive terms as the statute of Henry VIII.; and yet confirmation under it was plainly conducted as a judicial act and according to canonical forms.

"If, then, confirmation be still a judicial act, the next question is, who are entitled to interfere and to claim to be heard in the course of the proceedings. Now, the words of the citation used since stat. 25 Hen. 8. are in themselves clear as to this point. It cites all opposers, any persons who may think proper to come forward, and they shall be heard, and this citation is stuck up in the church before the day fixed for confirmation and, is proclaimed also at the time of the confirmation. Whether this form of citation was in use before the statute of Henry VIII. I believe does not distinctly appear; but if it was, the continuing of it is strong evidence to show that confirmation was treated after the statute as a judicial act, and if it was not in use before the statute, the making and introducing of it afterwards is perhaps still stronger evidence to the same effect. But that some citation to the same effect was always used in this country and under the canon law is, I think, clearly established. And it seems to me that I am not justified in saying that it was always a mere delusory form, though no particular instances are shown of opposers actually coming forward and being either received or rejected. Bishop Fell, however, in his work published in 1669, speaking of confirmation (I think the passage was cited in the argument), says, 'Nemine comparente quod tamen non semper evenit.' Now it seems difficult to say that the vicar general after such a citation could be justified in refusing to allow any person who came forward with objections by way of opposition in proper form, to appear to offer their objections, unless he was precluded from doing so by the statute. If the ordinary and accustomed mode of proceeding, was to make such citation *bonâ fide* the

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nostro, vel Ecclesiis prædictis, occasionibus Præmissis (quod absit) non eveniat quovis modo, prout in quodam Acto, in Parlamento prædicto inde habito, plenè liquet,

"Et ideò vobis Mandamus, districtiùs quo possumus Injungentes quòd, ad Confirmationem vestram, virtute Electionis de vobis, ut præmittitur, factæ, absque dilatione seu excusatione aliquali, efficaciter prosequamini, juxta Formam et Effectum Voluntatis, Ordinationis, et Acti supradictorum, sub Periculo quod incumbit; nè, pro defectu vestri, Damnum vel Præjudicium Nobis, aut Regno nostro, seu Ecclesiæ prædictæ, occasione dilationis hujusmodi, eveniat quovis modo,

"Teste Rege apud Westmonasterium, septimo die Aprilis.

"Et erat Patens.

Per ipsam Regem et per Concilium in Parlamento "

(A. D. 1416, An. 4. H. 5. Claus. 4. H. 5. m. 23.)

"Rex, Venerabili in Christo Patri, H. Dei gratiâ, Archiepiscopo Cantuariensi, totius Angliæ Primati, Salutem.

"Sciatis quòd,

"Cum nos nuper Electioni, nuper factæ in Ecclesia Cathedrali Sanctæ Trinitatis Norwici, de dilecto Clerico nostro, Johanne Wakeryng, Archidiacono Cantuariensi, in Episcopum Loci illius, Regium Assensum adhibuerimus et Favorem,

"Ac Nos, jam considerantes," &c. (as in the preceding writ, down to 'plenè liquet,' inclusive).

"Et ideò vobis Mandamus quòd ad Confirmationem præfati Clerici nostri, virtute Electionis sibi, ut præmittitur, factæ, absque excusatione seu dilatione aliquali, procedatis, ac cætera omnia, quæ vestro canonice incumbunt Officio, in hac parte, peragatis et exequamini, juxta Formam et Effectum Voluntatis, Ordinationis, et Acti supradictorum,

"Ita quòd, in vestri Defectum, Dampnum, vel Præjudicium, etc. ut supra.

"Teste ut supra.

"Et erat Patens.

Per ipsam Regem et per Concilium in Parlamento."

(A. D. 1416, An. 4. H. 5. Claus. 4. H. 5. m. 23.)

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archbishop or the vicar general could not of his own authority alter the mode of proceeding, any more than this court could refuse the wager of battle, whilst it by law existed, although the permitting all persons to appear and object under that citation may be very inconvenient and even mischievous. I would by no means be understood as expressing any approbation of such a mode of objecting in the present state of society, but the only question is, whether by law the persons had a right so to do. Nor did the vicar general act on any such supposed view, as I understand, but he refused to allow the objectors to appear at all, holding that the statute in effect took away any power or authority in the archbishop or his vicar general to hear any objections whatever. In this, as at present advised, I am of opinion that he misconstrued the statute, and declined a jurisdiction which he had by law, and therefore which he was bound by law to exercise, and as all persons were cited to appear, all those who offered to appear and were not allowed to do so, and certainly and more particularly two of them who are beneficed clergymen in the diocese of the bishop elect, are aggrieved by such refusal, and ought to have some remedy.

"Is then the writ of mandamus the proper remedy? No other is shown, I should doubt very much there being any appeal from the archbishop in a matter of confirmation, under any circumstances.

"The learned counsel Dr. Addams said, that there would be an appeal if persons had appeared and had been refused. I do not know of any such instance having occurred, and as at present advised, I should doubt very much whether there would be an appeal under any circumstances, but where a party has not been allowed to appear in court at all, he cannot be in a situation to appeal. It was said he could, but I do not see how it is possible that he could.

"Again, here is a declining of jurisdiction by misconstruction of an act of parliament, in which case a mandamus was held to lie in *Regina v. Justices of Kent*. (1) That was the case of a person who applied to the court of sessions to do that under an act of parliament, which they thought the act did not authorise them to do, and so they refused to act, and the mandamus was granted to put them in motion, but not directing them how to decide. Here the parties applied to oppose that which, but for the statute of Henry VIII. they would undoubtedly have been entitled to oppose; they are refused on a wrong construction of the statute, and the thing which they were entitled to oppose is done. The principle is the same, though the facts are different. It is the misconstruction of the statute and the declining to exercise jurisdiction which belonged to the court, which will render the confirmation void, if it be void, and not merely an erroneous decision as to admitting allegations, as in *Bishop of St. David's v. Lucy* (2), or wrongly admitting or rejecting evidence, or any other wrong conclusion, if there has been a hearing; for in such cases this court is not a Court of error and does not interfere. *The Queen v. the Parts of Kesteven*. (3) However Mr. Justice Holroyd, in the case of *Regina v. Justices of Caernarvonshire* (4), intimated that if the court of sessions had heard one side and altogether refused to hear the other, he should have thought it the

(1) 14 East, 395 (2) 1 Lord Raym. 544. (3) 3 Q. B. 810. (4) 4 B. & A. 88.

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same as if the case had not been heard at all, and that the mandamus ought to issue, though the sessions had come to a decision. Also in *Regina v. Justices of Cumberland* (1), where a complaint was made by an overseer against a man for not maintaining his wife, the man denied her to be his wife, and produced receipts for money paid by him to the overseer, in which the woman was treated as not his wife, on which the overseer offered to prove a marriage between the man and woman at Gretna Green, but the justices refused to receive it, and dismissed the complaint, this court granted a mandamus.

"These cases are not precisely in point, nor were any cited that are so, either on one side or the other, with respect to mandamus. That of the *Bishop of Saint David's v. Lucy* (2) is plainly not in point; for there both parties were before the Court, and the question was, as to admitting certain allegations, a matter which the Court of King's Bench could not determine upon or interfere with. Here the parties are not allowed even to appear, and that on the misconstruction of an act of parliament.

"If, indeed, by the known practice at confirmations at all times before and since the statute, independent of the supposed effect of stat. 25 Hen. 8. the citation of opposers in whatever form couched, was always a mere idle ceremony, meaning nothing, and not intended to be acted on by those who made it, like the challenge of the champion at the coronation, which was alluded to in the argument, and the vicar general had rejected the parties applying to be heard on that ground, the case might have come within the authority of *ex parte Smyth* (3), also cited in the argument. But if I understand the affidavits rightly, it was not so put by the vicar general, but his rejection proceeded on the construction of the statute. I think, therefore, as at present advised, upon the principle acted on in cases of mandamus, that this confirmation cannot be held good, and that a writ of mandamus may and ought to issue.

"A question was brought before the Court, as to the effect of the Church Discipline Act which limits prosecution to two years, and directs the mode of proceeding. Had this been an attempt to prosecute the bishop elect for some supposed offence committed more than two years ago, in a way not authorised by that act, of course it could not have been maintained; but this is nothing of the sort. It is an application to be allowed to appear and be heard according to the citation proclaimed by the vicar general, not by way of prosecution against the bishop elect, but to show that he is not entitled to be confirmed in that election, on account of some supposed objections. I do not see, therefore, that the Church Discipline Act touches the question at all.

"In coming to the conclusion at which I have arrived, I have entertained very great and serious doubts, and my mind has fluctuated, during the argument and since, very much, and more particularly with regard to the power of this Court to grant the writ of mandamus under the circumstances, and I cannot but feel very diffident in my opinion, considering that my lord and my brother Erle take so entirely different a view of the subject. I think it is admitted on all hands, to be one of very great importance and difficulty, and for that reason very fit, as it appears to me, to be, put into such a shape as

(1) 4 A. & E. 695.

(2) 1 Lord Raym. 544.

(6) 3 A. & E. 719.

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to enable the unsuccessful party here to take the opinion of a court of error. The power of bringing a writ of error having been granted by a recent act, has materially affected the duty of this Court, as it seems to me in regard to writs of mandamus. Formerly, when the decision of this Court was final, if the facts were not disputed, and the law was fully argued on the motion for the writ, no advantage was gained by delaying the decision upon that law until a writ had issued and a return been made; but now by refusing the writ, we prevent the party applying for it, from having the benefit of the recent statute, whereas if we grant it, the other party has still that benefit, and therefore, as I think, we ought now to grant the writ as a general rule, unless we are quite clear that it cannot be sustained.

“I am fully aware of the agitation of men’s minds, and of the strong feelings which are said to attend this case, and doubt not that much inconvenience would accrue from the ultimate decision of it being delayed; but I do not see that those are sufficient reasons for not putting the case into such a shape that recourse might be had to a court of error. It may be that that opinion as to our duty in respect to the writ of mandamus, may have influenced my mind somewhat in coming to the conclusion I have come to.

“I have not alluded, in the course of my observations, to that part of the affidavit, which discloses the nature of the objections intended to have been urged by the prosecutors of this writ. I do not think it at all necessary to do so, I consider the miscarriage to have been in refusing to allow the parties to appear and bring forward their objections, whatever they might be, which is wholly beside the question as to the nature of these objections. Upon them it would have been the duty of the archbishop or his vicar general to have determined, and this Court would not attempt to interfere with that determination. The present question must be, as I think, wholly independent of who the person is who has been elected bishop, and what is the sort of objections intended to be urged against him. It is a question applicable to every case of confirmation of a bishop as well as this.

“Upon the whole, though with the most unfeigned diffidence, I am of opinion that this rule for a mandamus ought to be made absolute.”

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LORD DENMAN: “This is an application for a mandamus to the archbishop of Canterbury and his vicar general, to hear certain reverend gentlemen, who appeared and claimed to be heard as opposers of the confirmation of the bishop elect of Hereford. Their affidavit states in substance that a citation was issued requiring all opposers to appear; that they did appear accordingly with their objections, and attended by counsel; and that their counsel were not permitted to do more than argue in favor of their right to be heard; after which, the vicar general proceeded with the confirmation, and declared that no opposers appeared, and pronounced all opposers contumacious for not appearing. They add, that the opposition intended was founded on two books, written, printed, and published by the bishop elect, repugnant to the articles of Religion; and they contend, that the confirmation which followed is, on this account, and by reason of this refusal, wholly null and void.

“Various arguments were urged to prove that a mandamus would not lie in this case, even though some wrong were done. I am clearly of the contrary opinion; and, even if I doubted of this, I should think it better to issue the writ, reserving the question of its validity, than by refusing it

to run the risk of abridging the queen's just prerogative, exercised by her in this Court, to insure the enjoyment of her rights in other Courts and on other occasions,—a prerogative not only important to the dignity and power of the Crown, but become necessary, particularly of late years, to enable her subjects to enforce their claims against each other.

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“But I advisedly abstain from discussing these several objections. I might fully excuse myself from doing so, after the very able argument of my brother Patteson, in which I entirely agree upon this point; and also, because my judgment proceeds upon other points, to which, therefore, I will now direct my attention.

“Furthermore, I am of opinion that there is a *prima facie* case of wrong: the previous citation for opposers to appear at a confirmation, and the proclamation at the time to the same effect, furnish to my mind some evidence that opposers had a lawful right to appear and be heard to make their objections; and when opposers come, and are eager to state their objections, to stop their mouth at the very outset of the ceremony, and close the door of the Court upon them, is a practice reflecting no honour on the wisdom of those who framed it. The absurdity of these particulars can only be exceeded by the sentence of contumacy with which they close, solemnly pronounced on those who appear and press for an hearing, for their default in not appearing. This anomaly, however, has been deliberately gone through, and is distinctly avowed by persons entitled to our highest respect and almost unbounded confidence, by the venerable primate of the realm, a bishop during a quarter of a century,—an archbishop during much the greater part of that period,—who must have taken a leading part in the confirmation of almost all the reverend prelates who now adorn the bench,—one who, in trying times, has uniformly displayed, among higher qualities, the utmost prudence and moderation and care: his fine mind and highly cultivated understanding not impaired by age, but matured by experience and reflection. The act complained of has proceeded upon the sanction and approval of persons most eminent in the law, and most conversant in these particulars, who were his grace's immediate agents in excluding the complainants; and all these persons justify what they have done not by any attempt to show that it is consistent with justice, reason, or propriety, for, on the contrary, they lament the continued adherence to a form which they admit to be strange and scandalous; but they rely on an express enactment of the law of the land, the statute passed in the 25th Henry VIII., which stated, that it had not before been plainly and certainly expressed in what manner and fashion archbishops and bishops should be elected, presented, invested, and consecrated within the king's dominions; and proceeded then fully to prescribe all the particulars by which a bishop was to be thereafter made.

“The first step in this process, on the avoidance of a see, is the *Congé d'Elire*, accompanied by the Letter Missive, so often explained—then the form of election—then the certification of it, under the seal of the chapter, to the king, whereupon ‘he shall be taken and reputed by the name of lord elected of ye said dignity:’ then after the oath of fealty taken, ‘the king's highness, by his letters patent, shall signify the election to the archbishop, requiring and commanding such archbishop to confirm the said election,’ not to confirm it as of old time, not to follow any form of con-

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firmation which had been practised up to that period, whatever that might be, but the command is 'to confirm the said election, and to invest and consecrate the person so elected to the office and dignity that he is elected unto:' upon which enactment the first observation that occurs to me is, that no particular form of confirmation is given, no reference is made to any antecedent practice.

"Reference is next made to the statute of 23d Henry VIII., (cited in this statute of the 25th,) entitled 'An act for restraining the payment of annates to the see of Rome,' but extended far beyond that object: for, after denouncing the former exactions of the pope, as the means of delaying appointments made by the king, it enacted, that if any person hereafter named, and presented to the court of Rome, shall be there letten, deferred, or delayed from such bishoprick, or shall be denied the requisite bulls, 'such person shall be consecrated here in England by the archbishop in whose province the said bishoprick shall be: so alway that the same person shall be named and presented by the king for the time being to the same archbishop;' being so named and presented, consecrated and invested, he shall be deemed and taken to be and obeyed as a bishop. The word 'confirm' never once occurs in this statute which was in force and is kept alive by the 25th Henry VIII., so that any person delayed by Rome from his appointment to a bishoprick, and afterwards named and presented by the king to the archbishop, is not thereby required to be confirmed at all, but must be consecrated on the king's sole nomination and presentation.

"Another provision of 25th Henry VIII. was pressed as material to show that confirmation was intended to be ministerial only. If the dean and chapter refused to elect for twelve days the nomination was in that case given to the king, without any necessity for confirmation.

"To prove the notions prevailing about this time on the same subject, we were also referred to the act of Edward VI., which recited, with much disapprobation, the mock election under *Congé d'Elire* and *Letter Messive*, stigmatizing those proceedings as 'colours, shadows, and pretences serving to no purpose, and seeming derogatory and prejudicial' (and, with deference to my learned brother, I must say they do so seem, if the queen had that power notwithstanding that election) 'to the king's prerogative, to whom only appertaineth the collation and gift of all bishopricks in England and Ireland,' and gave the appointment to the Crown by letters patent. This act of Edward VI. was indeed repealed, and so was the 25th Henry VIII. in the reign of Philip and Mary. 25th Henry VIII. was revived in the reign of Queen Elizabeth; but this (it was said) could not have been from respect to the principle of confirmation, because in her reign the nomination to all the bishops of Ireland by letters patent was vested in the Crown, and for them no confirmation was required.

"The statute in question was undoubtedly framed in that spirit of jealousy towards Rome which was severing one by one all the ties between this kingdom and that see. But neither King Henry VIII. nor any other king was likely to leave the 'manner and fashion of making bishops,' when he once set himself about it, imperfect for the time to come, when that was one of the professed objects of the statute, put forth in the preamble of the 7th section. And it was asked, whether such a king, in particular, was likely at the same moment to deprive the Pope of his veto and lodge it in

the hands of one of his own subjects? The only answer to this pertinent question, if I understand it properly, I confess I could not hear without surprise and regret. As I caught it, it was a reflection, and a severe reflection, on that great father of the English Protestant Church, Archbishop Cranmer. I understood the solution of the difficulty to be, that 'The king knew how obsequious an archbishop he had in Cranmer, who would readily conform to any wish that the royal mind might conceive.' Cranmer was not a blameless man, very far from it. Shortly before his death he betrayed a lamentable want of firmness, — not, however, greater than his, who was selected from among the apostles as the rock on which the everlasting church was to be built. Yet his noble bearing, when he met at last the death he had too much feared, might have been expected to protect his memory from general reflections like these. In a court of law: 'In questione legitimâ, in judicio publico, cum res agatur apud judices, tanto conventu hominum ac frequentiâ, hoc uti genere dicendi, quod non modo a judiciorum consuetudine, verum etiam, a forensi sermone abhorreat,' seemed a remarkable use of the opportunity afforded. In the presence of so many learned and faithful sons of the Church of England, I certainly did not expect to hear the name of Cranmer introduced only for such a purpose. I should have observed this, of course, not for the sake of any personal observation upon the very learned gentleman who uttered this sentence; but I do think that it shows an excitement of mind existing somewhere upon the present subject, whether in the client or the counsel, which makes it doubly our duty to take care that we are not led away by the impressions on their minds, or too ready to yield to that ecclesiastical authority which, in my opinion, justly and wisely, it has been the duty and the boast of this court, in all ages, to watch with peculiar jealousy.

"If Henry reckoned upon Cranmer as a mean and servile churchman, who would always yield to his caprices, he assuredly mistook his man. The archbishop more than once thwarted the inclination of his sovereign. When Anne Boleyn's fate was sealed, 'Cranmer alone,' (says Hume,) 'of all the queen's adherents, still retained his friendship for her, and, as far as the king's impetuosity permitted him, he endeavoured to moderate the violent prejudices entertained against her,' — his long letter of remonstrance is preserved by Burnet, and probably no surer method could have been found for exasperating a selfish monarch than to protect the queen in her prosecution. Again: I would mention, that afterwards, in 1539, when the six articles were drawn up by a committee of the privy council appointed by the king, they met with Cranmer's vigorous opposition. When they were afterwards brought into the House of Lords, there also he spoke against them, declining to obey the king's injunction to absent himself, and this at a time when the royal mind was bent on the extirpation of all doctrines differing from his own, by torture and death.

"But taking that expression in its milder sense, as only stating the king's hope that Cranmer would be willing to listen to his suggestion, Cranmer was not immortal, and other less friendly or less tractable metropolitans might succeed him. Henry VIII. knew the strength and obstinacy of religious faith from his own experience, having seen one of the most upright and virtuous of men, lately his own well-beloved chancellor, lay his head on the block, rather than admit his supremacy. He had seen the

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power of eminent ecclesiastics both at home and abroad — he could not be ignorant of the past, but was probably as well acquainted with the time of Henry II. and Thomas à Becket, as with any other chapter of English history. Why, with full means of securing his own complete control over so capital a part of his government as the making of bishops, he should leave it in any degree to hazard, no ingenuity can discover a reason. And besides, the parliament itself, at its meeting, had expressed their discontent with the clergy, and especially had complained of the archbishops' courts, which they could feel no temptation to invest with any new jurisdiction.

“ These considerations are surely entitled to great weight, the whole argument on the other side resting on the single word ‘*confirm*’ found in the statute. It does not, however, stand singly, but is joined with election, ‘shall confirm the said election,’ and these words plainly and more naturally describe a duty connected with an election necessary to be performed by somebody which appears originally to have devolved on the metropolitan.

“ In the times when the election was real, two things required to be certified to the high functionary who had to confirm it, not having been then and there present: — first, that the election was duly made; secondly, the identity of the person who brought the certificate. The office of ascertaining these matters was, perhaps, scarcely befitting the dignity of the archbishop, if that had been all; but his presence, his benediction, his gracious reception of his new colleague in the sight of the people, tended to secure their respect and obedience. Those who maintain this rule say that he had much more to do, to hold a Court for summoning accusers from every quarter, and for hearing every kind of objection to the eligibility of the lord bishop elect; and the question is not whether he had authority to confirm or not, and to exercise some discretion, but whether he was bound to open a court of this description for the purpose first described: such is the duty now sought to be imposed on the Archbishop of Canterbury. I would ask, is there any necessity for this? That person was formerly ordained a deacon, more lately a priest, the whole world were called upon at those two several periods to pronounce whether they suspected him of any great crime or offence; if they did on his first ordination that was delayed until he was clear of the charge. The same process was again gone through when he was made a priest. All might come to make particular accusations if they thought proper, of any great crime or offence, and then that was cleared or the ordination could not proceed. This person then has already twice undergone, every bishop has undergone this ordeal, and the ordaining bishop was twice enabled to institute all needful inquiries into his life and conversation. But the deacon has become a priest, and the priest become now the lord bishop elect, bearing the additional testimony of the election itself, by parties competent to judge of his fitness in all respects, or since that statute he brings his nomination by the Crown. Is that to pass for nothing as a testimonial? Why is the archbishop to suspect and to commence any inquiry, and much more, why is he to call upon all mankind to question the confirmation? If the election were in the people at large, every one voting according to his opinion of the candidate, no instance occurs of such a court of accusation being held. But here the election had passed away from the people, and vested for ages in the dean and chapter, who have

presented the bishop elect for confirmation, under the express recommendation of the Crown.

“ The limitation of time imposed by the statute, on the two great processes of election and consecration, seem to afford material support to this view. The election must be made in twelve days: if not, the king may nominate. The archbishop is enjoined to consecrate in twenty days, which would suffice for the preparation and transmission of documents from the most distant parts of the country. Again, the election is reduced to a mere form, the appointment being both virtually and in terms to be made by the king. The consecration wears a more solemn aspect; the Book of Common Prayer prescribes the impressive forms with awful sanctions. The bishop when elected and his election confirmed before receiving Episcopal ordination, is to be called, tried, and examined, and the archbishop, after receiving him at the hands of two bishops, demands the king's mandate for his consecration. Certain oaths follow, then the litany, ‘ then the archbishop sitting in his chair,’ shall put certain fixed questions to him that is to be consecrated, and to those fixed answers are to be given by him. The thirty-sixth of the Articles of Religion declares expressly that the consecration shall be in that form, which shall be deemed perfect, and according to the law of God. The consecration therefore is said to be, like the election, little more than nominal; the one initiated by the dean and chapter, and the other consummated by the archbishop, but both in reality the acts of the king; and if this be so, we are asked to discover some reason why the confirmation should be more real than these. ”

“ The answer attempted is that the word ‘ confirm ’ had a known legal meaning in the time of Henry VIII., and was used by the Legislature in its legal sense. After remarking that though it might bear that sense, it did not bear it to the exclusion of any other, I will proceed, however, to inquire what was at that time the meaning of confirmation by the archbishop, and whether the gentlemen who come forward and contend that confirmation was understood to mean the power of holding a Court, with the duty of summoning all persons to come in and oppose the confirmation of the bishop elect, are right in so contending. The favour of his sovereign is supposed to place the lord bishop elect in no position analogous to any thing I am aware of but that of a felon, upon whose trial the jury is charged; he has pleaded ‘ not guilty,’ and forthwith all persons are invited by public proclamation, if they know of any treasons, murders, felonies, or other misdemeanors done or committed by the prisoner, to come forward and give their evidence. In that situation the bishop is placed by the favour of the Crown. The black catalogue of treasons, murders, felonies, and misdemeanors is made darker and more ominous by that word which has crowded with crimes the records of mankind, the fatal and comprehensive description, heresy.

“ When engaged on this general subject, I think it necessary to re-assert what has so often been declared by our illustrious predecessors in this Court, and by the greatest writers on the English Constitution, that the canon law forms no part of the law of England, unless it has been brought into use and acted upon in this country. Hence, rather differing from what I have heard to-day, I am of opinion that the burden of proof rests on those who affirm the adoption of any portion of it in England. I thought of stating

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that, merely by way of protest, because some things were said at the bar which seemed to question so important a position. But I do not dwell upon it, not wanting that principle here, inasmuch as I am fully convinced that this practice has never existed at all authoritatively in this country, and for this I mainly rely on the arguments of those learned gentlemen who have supported the present motion; they have satisfied me that no such opposer ever has been heard on any such occasion: this fact I draw, not from affidavits or documents, but the total absence of all affirmative proof of a proceeding extraordinary, so striking, and so affecting, that if it ever took place it must have been notorious, proves to me that it never took place; there is not, in my opinion, a trace of such proof; all records, historical and legal, present a perfect blank to our investigation of this subject. It was thrown out on the motion that such opposition had never been necessary before, as if none suspected of unsound doctrine had ever been raised to the Episcopal office. What? During all the centuries that Christianity has flourished in this country, not one infected with heretical opinions or *bond fide* thought to be so tainted? Was there in those dark ages no spirit of persecution, no spiritual pride? But supposing all to have been orthodox and universally admitted to be so, has no one ever been promoted whose piety and morals were not wholly above all exception? And even assuming this, were there none capable of preferring a false charge? Was envy dead, was faction banished from the world? Where were the sons of Belial at that time? We know that the family is not extinct even now, and there never could be a field in which they could act with so much delight.

“Observe what would happen, ‘come forth and oppose the confirmation of the bishop elect,’ such is the invitation of the public officer to the whole people, first pronounced in the church, afterwards ejaculated at the door. An answer would surely have been heard in some quarter, ‘Here am I to tell you that I remember the bishop elect at college some twenty years ago, and I recollect some irregularities of conduct which in my judgment unfit him for a bishop.’ A second says, ‘He is justly suspected by me of having but recently performed the church service in a state of ebriety.’ The charges may be rung on all those offences or defects which are blemishes to the Episcopal character, all from which the Pharisee blessed God that he was himself exempt. His mother’s chastity may be impeached, or his own ill management of his son. The archbishop may deem the charges frivolous, or may know them to be false; he may think that they have been atoned for by a long life of piety and virtue, or he may know the accusers to be infamous and malignant, and utterly unworthy of belief. This, however, does not alter his duty; the inquiry must proceed, and whatever the result, even if the confirmation is delayed but a day, some taint of calumny may remain. But before these articles are well committed to writing comes the unfathomable charge of heresy, to be proved by extracts from books, or reports of conversations in their nature difficult to understand, remember, and report, and defying the most innocent man to answer them without the comparison of other passages, and the explanation that may take out the sting. If no other effect results, he must be a clumsy accuser who could not prolong the debate, so that the confirmation might be ‘letten deferred and delayed’ till the natural life of all concerned is closed, the see in the mean time remain-

ing without a bishop, and the archbishop's whole time having been diverted from his high duties to this absorbing investigation.

"The existence of this court being inferred, we are next to infer what its proceeding must be: this we derive from the citation of opposers, from the formula used in confirmation, and from the *schedula prima* exhibited by the proctor to the dean and chapter, who prays that their election be confirmed. This *schedula* is thus described by Bishop Gibson, in a note to the statute 25th of Henry VIII., correctly copied by Mr. Stephens, in his useful work on Ecclesiastical and Eleemosynary Statutes. 'It exhibits the citation and return, prays that the opposers (if any be) not appearing may be pronounced contumacious, and precluded from further opposition; and that the confirmation may be proceeded in, which is accordingly done by this schedule.' A *summaria petitio* is then presented by the same proctor, setting forth, among other things, the fitness of the person elected. A '*schedula secunda* before sentence, a second præconization of the oppositores, if any be, is made *ad fores externas ecclesiæ*, and none appearing they are declared contumacious by a second schedule.' In this court of confirmation then, which is turned by the argument into a court of opposition, it is absolutely taken for granted that no opposers will appear, and if they do, no provision is made for their being heard, nor for what shall be done if they are heard; in truth, the non-appearance of opposers is as much a part of the proceeding as any other part of it, though the absurd form of pronouncing them contumacious is still preserved, perhaps through the jealousy of all change which has so often obstructed improvement, perhaps from another difficulty generally found in the way of reformation, because certain emoluments were earned by these idle ceremonies in each of their ten stages.

"The evidence then that this opposition actually took place in the most ancient times, is the very same as that which would prove its existence during the last three centuries, the fact of the proclamation made. But we know the contrary of this. In point of fact it has been mere matter of form during the whole of the latter period, why not of the former? When the inadequacy must have always been as palpable as the iniquity of a proceeding, which would have no certain results but uncharitable feelings and permanent disquiet in the church, why may not the ecclesiastical authorities themselves, even in the most ancient times, have the credit of tacitly surrendering so invidious and dangerous a power, or rather of refusing to adopt it?

"I will not say that any attempt to carry this supposed law into effect must have shown its impracticability and insured its rejection; but such a consequence is highly probable, and will best account for its non-appearance in the books.

"But let us consider what a mighty edifice is sought to be raised on this naked word 'confirm,' a court for the trial of unknown accusations, a judicial authority with process and practice of its own, the power of summoning and compelling witnesses, of securing respect to itself, and enforcing its orders and decrees. We are told that the archbishop has already a court so endowed, the court of audience, which appears in Lord Coke's enumeration in his 4th institute, who never imagined, however, that it enjoyed these functions; yet all admit that this court is possessed of no contentious

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jurisdiction whatever; the vicar general presides there, but he is no necessary party to attend the confirmation of a bishop's election.

"That this Court has ever done what the archbishop is now required to do, no one has pretended.

"That the appointment of bishops is vested exclusively in the Crown, since the time of Henry VIII., has been an universal opinion: that any opposer ever appeared, there is not even the shadow of a surmise. The records of the court of audience, and of all other ecclesiastical courts, are silent as to any attempt of the kind, with a single exception, to which I now advert. In 1628, Bishop Montagu was presented for confirmation; according to custom, opposers were challenged, and contrary to custom an opposer claimed to be heard. He accused him of personal unfitness on account of the bishop's theological opinions. The vicar general, Dr. Rives, is reported to have refused him a hearing, but he is said to have grounded his refusal solely on the fact that the charge was not written, and then to have added that if it had been written, he would have received it. The report is loose and unauthenticated. But, if literally true, to what does it amount? Of Dr. Rives we know but little, and that not much to his credit; but that which is said to be the law under circumstances not requiring judicial consideration is of little value. We have reason every day to repudiate the claim to make law by these *obiter dicta*. To me, however, it is tolerably clear that Dr. Rives was wrong, if the law is as the prosecutors of this rule suppose: nothing is said in that law about writing: the opposers might be unable to write. The person who wished to become an opposer to the confirmation of the bishop of Manchester (1) may now come forward for a mandamus, and argue that that act was null and void because his opposition was shut out for

(1) At the confirmation of the election of the Bishop of Manchester (St. James's Church, Piccadilly, Jan. 8, 1848), the license of the Archbishop of Canterbury, allowing the Archbishop of York to confirm and consecrate the new bishop anywhere within the province of Canterbury was read, followed by a commission from the Archbishop of York, whereby, after reciting that he had received letters patent from the Queen, commanding him to confirm the election of the Rev. J. P. Lee to be bishop and pastor of the see of Manchester, his Grace gave power and authority to Mr. G. H. Vernon (his Vicar-General), Dr. Burnaby, Sir H. Jenner Fust (Official Principal of the Arches Court of Canterbury), Dr. Lushington (Chancellor of the Diocese of London), and Sir J. Dodson, or any or either of them, to confirm the election accordingly, so far as it should appear to them that it was rightful, &c.

The proctor for the Dean and Chapter of Manchester then handed in the Queen's letters patent, and presented the Rev. J. P. Lee to be confirmed; and proclamation was made for opposers by an officer as follows:—"All manner of persons who shall or will object to the confirmation of the election of the Rev. James

Prince Lee to be bishop of the episcopal see of Manchester, are now to come forward and make their objections in due form of law, and they shall be heard."

Mr. GUTTERIDGE immediately said,—"I am an opposer, and object to these proceedings."

Sir J. DODSON.—"What is your name?"

Mr. GUTTERIDGE. — "Thomas Gutteridge."

"Where is your residence?"—"I live in Cannon-street, Birmingham."

"What is your profession?"—"I am a surgeon."

"Do you mean to object to the confirmation of the Lord elected Bishop of Manchester?"—"I do."

"Have you your objections drawn up in what purports to be due form of law?"—"Yea."

"Sir J. Dodson.—"Let me see them."

Mr. GUTTERIDGE.—"The first is a protest against the proceedings of this day,—I, Thomas Gutteridge, a member of the united church of England and Ireland, do protest against the proceedings of this day, for the confirmation of the Rev. J. P. Lee, Bishop elect of Manchester, on the ground that it is unlawful to proceed to such confirmation elsewhere than in the province of York, and

the same bad reason. True, that right reverend prelate has been consecrated; but if this court of confirmation is bound to hear all opposers, and the refusal renders the proceedings null and void, a very plausible foundation at least is laid for a motion for a mandamus in that case as well as this.

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also on the ground that due and sufficient notice and publicity have not been given of such intended confirmation."

Sir J. DODSON. — "The protest cannot be entertained."

Mr. GUTTERIDGE. — "I have also articles to present."

Sir J. DODSON. — "By whom are they signed?"

Mr. GUTTERIDGE. — "By myself, 'Thomas Gutteridge.'"

Sir J. DODSON. — "We feel it to be our duty not to permit you to appear and oppose the confirmation of the Lord elected Bishop of Manchester. We sit here as commissioners of his Grace the Lord Archbishop of York, for the express purpose of confirming the election made by the Dean and Chapter of Manchester, and we consider that we are bound by law to proceed to the confirmation without committing or suffering any let or hindrance thereto. The statute 25 Henry VIII., c. 20, is imperative upon this matter; it leaves no choice. By the 5th section of that statute the Archbishop, upon the election being signified to him in letters patent from the Crown, is required and commanded to confirm the election, and to invest and consecrate the person elected. By the 7th section of the same statute it is enacted, that 'if the Archbishop, after such election shall be signified to him by letters patent from the Crown, shall refuse and do not confirm, invest, and consecrate with all due circumstance the person so elected and signified within twenty days next after such signification shall come to his hand, or if the Archbishop or any other person admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or any other process or act, of what nature, name, or quality soever it be, to the contrary or let of due execution of this act, then the Archbishop and all other persons so offending and doing contrary to this act, or any part thereof, and their aiders, counsellors, and abettors, shall run in the dangers, pains, and penalties of the statutes of provision and *præmunire* made in the 25th year of Edward III. and in the 16th of Richard II.' We are not disposed to run into those dangers, pains, and penalties, and we are resolved, neither ourselves to do, nor to allow, so far as we can prevent it, any act to be done by another, which may be to the let or hindrance of the confirmation of the Lord elected Bishop of Manchester, or which may in any way contravene the provisions of the statute, especially as you have produced no objection in due form of law. Upon the ground which I have stated—

the imperative nature of the statute—we do refuse to hear you further in objection to the confirmation of the Lord elected Bishop of Manchester."

Mr. GUTTERIDGE. — "Believing that I am acting in obedience to the law, I do also present to you on this occasion another instrument, which is a libel, and is intended to apply to this case, with a view also to stop these proceedings. I hand these documents to you now."

Sir J. DODSON. — "We cannot receive them."

Mr. GUTTERIDGE. — "I place them on this table; I present them to you, and I solemnly protest against these proceedings."

Dr. BURNABY. — "There can be no protest against this course of proceeding."

The Proctor then prayed that all persons cited and not appearing might be precluded from the means of further opposing against the said election, the manner thereof, or the person elected. He also exhibited the original mandate, and a certificate concerning the election, and alleged that the matters set forth therein were true, and so had and done as therein contained; and he prayed all of them to be admitted, and sentence given: and these and other public instruments exhibited during the proceedings were declared admitted accordingly.

Opposers being again called, before sentence,

Mr. GUTTERIDGE said — "I protest against these proceedings for confirming the Rev. James Prince Lee as Bishop of Manchester, for the reasons which are already placed before the Court."

Dr. BURNABY. — "We cannot entertain that protest."

Opposers were then pronounced contumacious. The Bishop elect took the oaths of allegiance, of supremacy, against simony, and of obedience to the Archbishop of York. The commissioners then gave, and signed, the definitive sentence, as follows:—We do find that the said election was rightly and lawfully made and celebrated by the Dean and Chapter of the Cathedral Church of Manchester of the Rev. J. P. Lee, a man both prudent and discreet, deservedly laudable for his life and conversation, of a free condition, born in lawful wedlock, of due age, and an ordained priest; and that there neither was nor is anything in the ecclesiastical laws that ought to obstruct or hinder his being confirmed by our authority bishop of the said see; and we do confirm the aforesaid election of the Rev. J. P. Lee, and we do commit to him the care, governance, and administration of the spirituals of the said Bishopric of Manchester.

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“Some dicta were also cited from our law books, or rather one dictum in the case of *Evans v. Askwith*, reported by Sir Gefrey Palmer and Sir W. Jones. A distinction was taken between a bishop elect only, and a bishop confirmed. The dean of York had been promoted to an Irish bishopric. In an interval of a year, which passed between his promotion and his confirmation, he had granted a lease as dean, and the question was whether he was not incapacitated from doing so by becoming a bishop. The Court said he was not a bishop till confirmed: his title to the temporalities was but inchoate. The Court said ‘till confirmed he may possibly be rejected.’ One of the judges in the course of the very extended argument, about half the length of that argument which we have lately heard, declared that opposers on the occasion are always summoned. This was perfectly unexceptionable; but it proves nothing to the point. His full title depends on the archbishop’s confirmation; and in the course of that proceeding opposers are called for: they were called for on the present occasion. Judge Whitlock, to shew that the nomination was not alone sufficient, alludes to the possibility of its never being completed, and speaks of the ceremony, which plainly shows its imperfection; but he drops no hint that he had ever heard of an opposer being admitted, and so he leaves the case precisely where it was.

“A useful pamphlet was referred to by the learned civilian who supported the rule, a collection of extracts showing the sentiments entertained by canonists, divines, and others, upon the royal prerogative, not by judges or students of either branch of law. The general scope of this little work is to illustrate the doctrine so clearly laid down in the 37th of our Articles, that the Sovereign has not the power of the keys, and cannot confer orders.

“‘The Queen’s Majesty hath the chief power in this realm of England, and other her dominions, unto whom the chief government of all estates of this realm, whether they be ecclesiastical or civil, in all causes doth appertain, and is not, nor ought to be subject to any foreign jurisdiction. Where we attribute to the king’s majesty the chief government, by which titles we understand the minds of some slanderous folks to be offended, we give not to our princes the ministering either of God’s word, or of the sacraments, the which thing the injunctions also lately set forth by Elizabeth our queen do most plainly testify—but that only prerogative which we see to have been given always to all godly princes in holy scriptures by God himself; that is that they should rule all states and degrees committed to their charge by God, whether they be ecclesiastical or temporal, and restrain with the civil sword the stubborn and evil doers.’ The whole of this article must be taken together. There is no power of the keys; none to ordain, or to absolve—but there is a power over ‘all states and degrees committed to their charge by God, whether they be ecclesiastical or temporal.’

“This is the power claimed now to be exercised by the Crown, but which the Crown does not in effect possess, if the archbishop can reject on opposition the bishop nominated by the Crown.

“One of these extracts ‘taken from a dialogue between a Roman Catholic and a member of the Church of England’ is remarkable. The Catholic objects that under the Reformation there are as many popes as kings, and that they do assume priestly power; but the answer of the member of the Church of England is this: ‘The freedom of election doth not exclude the king’s sacred authority, but force and tyranny only. If

any unworthy person should be forced upon them against their wills, or the clergy should be constrained to give their voices by force and threatening, such an election cannot be said to be free. But if the king do nominate a worthy person according to the law as our kings have used to do, and give them authority to choose him, there is no reason why this may not be called a free election. For here is no force nor violence used.' Then the Catholic proceeds: 'But if the king, deceived by undeserved recommendations, should happen to propose to the clergy a person unlearned or of ill morals, or otherwise manifestly unworthy of that function, what is to be done then?' The answer is, 'Our kings are wont to proceed in these cases maturely and cautiously—I mean with the utmost care and prudence; and hence it comes to pass that the Church of England is at this time in such a flourishing condition.' Then he pursues it: 'Since they are but men, they are liable to human weakness, and therefore what is to be done if such a case should happen?' The answer is, 'If the electors could make sufficient proof of such crimes or incapacities, I think it were becoming them to represent the same to the King with all due humility, modesty, and duty, humbly beseeching his Majesty out of his known clemency to take care of the interest of the widowed Church. And our princes are so famous for their piety and condescension that I doubt not but his Majesty would graciously answer their pious petition, and nominate another unexceptionable person agreeable to all their wishes. Thus a mutual affection would be kept up between the bishop and his church. Thus I have showed you that our kings have had a singular prerogative in the election of bishops, and now I am to prove that they had the same lawfully.' Then King Charles II. is alluded to in this pamphlet as 'having taken into his serious consideration how much it will conduce to the glory of God, his (the king's) own honour and the welfare both of our Church and Universities that the most worthy men be preferred and favoured according to their merits,' and made an order that no secretary of state should move his Majesty on the behalf of any person whatever for preferment in the church without having the attestation of certain high persons, including the Archbishop of Canterbury and the Bishop of London for the time being. King William III. made a similar order; but all this was without the least reference to the supposed power of the archbishop to examine and to enter into any proceeding at the time of the confirmation. Bishop Gibson is mentioned in the same pamphlet, and he is a most remarkable authority in my opinion upon the subject. He was assailed by one of the most learned judges who ever sat in this court, Sir Michael Foster, as one disposed to erect the Church into an imperium in imperio, a sacerdotal order which must in time absorb all the other powers in the state. Gibson wrote his invaluable treatise the Great Storehouse of Ecclesiastical Law, and from that, copying more ancient works, we derive all the evidence in favour of this application. Yet neither in that work nor in the course of any proceedings taken by him does he assert the existence at any time of a power in the archbishop to defeat by such an inquiry as that suggested the nomination of the Crown.

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"There were certainly questionable appointments made of persons of doubtful orthodoxy, upon which it is only necessary to mention that no less than four times Bishop Hoadley gave all mankind the opportunity which resulted from this supposed court of summoning all to appear to

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make their opposition to his election on account of his opinions. No such opposition was ever made, though there might be, and very probably was, remonstrance against his appointment. Acting on this principle, too, Archbishop Wake remonstrated successfully against the promotion of Samuel Clarke, and Bishop Gibson against that of Dr. Rundell. From an able treatise lately published in a magazine, which is quoted in the same pamphlet, we are told that other sovereigns have consulted the archbishop before they promoted to offices of such high importance. But not a word is uttered to show that the archbishop could institute, and was bound to institute, an inquiry into the merits and demerits of the parties nominated by the Crown if any opposer thought proper to malign them at the time of confirmation.

"I will not take an imaginary case, but will now advert to recent facts as much a part of the history of our country as those which occurred in the time of Henry or Elizabeth. We know that on the rumour of an intention of the Crown to make a particular promotion thirteen or fourteen right reverend bishops thought the appointment highly objectionable, and addressed to the prime minister a strong remonstrance against it. They urged various topics—the probable discontent of the clergy, the recorded censure of one of our universities; but there was one topic of far greater weight if this application is sustainable to which they never adverted. They never warned the minister against the scandal of a public opposition at the time of confirmation, and the possibility of the Queen's nominee being rejected by the archbishop as a heretic. One of the most distinguished among them warmly entreated for the dean and chapter, that they might not be exposed to the peril of a *præmunire*, nor be called upon to elect one whom in their conscience they could not approve, since their rejection must be followed by that consequence. There was no such intercession in favour of the archbishop who might incur the same danger, no intimation that his grace was not equally bound by the statute to confirm the person if he should be named by the Crown, no assertion of the danger and disgrace of an opposition so likely to arise in numerous quarters if one condemned by a convocation at Oxford should be elevated as a mark for animadversion in St. Mary's church.

"The archbishop is said to be converted into a mere machine by exercising the functions with which he is well contented. The phrase suggests to me the idea that our writ is sought for to construct a machine fraught with something like galvanic influence to revive a body which has been dead for ages—that it may perform some convulsive manœuvres for twenty days, and then relapse for ever into its dread repose. But the simile would imply that the form once had animation which in my conscience I do not believe.

"It is not true to represent the archbishop as a mere machine, even if ministerial in the confirmation.

"I have shown some duty attaching to that office not unlike that of a returning officer at a parliamentary or municipal election. This confirmation is necessary to give the new bishop all his rights. The archbishop is not unlikely to make some inquiry touching the bishop elect; and if the result should lead him to the opinion that the appointment would be injurious, he may (as we have seen) advise the Crown in the first instance

against issuing the Congé d'Elire and Letter Missive. Even afterwards, if he is since informed of facts which really convince him of such mischief, he may still resort to the sovereign and request to be relieved from the painful duty imposed by the statute. He may make it clear that the Congé d'Elire and Letter Missive were obtained in ignorance of the truth and ought to be set aside.

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“Extreme cases are ingeniously devised, but are not, and cannot with decency be thought, possible; but even if the worst be supposed, if the Crown will persist against warning and remonstrance in nominating a bishop whom the metropolitan cannot consent to confirm, without violating his conscience, his duty is clear. He must act as some of our predecessors in old times have done, when required to submit to dictation from the Crown—they forfeited their offices by not obeying—he must resign. From the course taken by the present archbishop, I have no doubt that after hearing of the objections notoriously made to the doctrine of Bishop Hampden, his grace has formed the deliberate opinion that those objections have no solid foundation.

“I would ask whether it has been the opinion of any person until within these few weeks, and until this unhappy controversy arose, that the absolute power of appointing bishops was not in the Crown. If it has only come into being since this very inflamed state of mind has arisen, surely we ought to regard all arguments upon the subject drawn from remote antiquity, and from obscure cases, with very considerable jealousy. When I heard Sir Fitzroy Kelly, with his impressive solemnity of manner, entreat that we would not expose the archbishop to the mockery and shadow of having all the prayers recited, for the mere purpose of going through a form, and acting a farce, I confess I hardly knew how to meet it. Are the dean and chapter to be treated as nothing? Do they proceed without prayer and without solemn ceremony?—If they are required, notwithstanding all this, under the threat of penal consequences to elect a particular person, and none other, the law which compels them may be an unreasonable, ill-considered, and impious act of parliament that ought to be repealed; but why should there be more objection on account of this solemnity being introduced to the archbishop's share than to that of the dean and chapter? I forbear for obvious reasons entering more fully into that. I was reminded of the Roman augurs, who were said never to meet one another without laughing, and I think that if these gentlemen had induced us to issue this writ upon considerations of the incredible scandal and impropriety of using a solemnity upon such an occasion, they would have had some reason to laugh at our expense. I agree with my brother Coleridge, that our time has been much too short to write as fully as might be desired, though not I think to form a satisfactory opinion. I have devoted as much time as I could afford to the task of placing my conclusions upon paper, that nothing might bear the least appearance of captious remarks upon what has fallen from my two learned brethren, in their most able and well considered arguments. I abstain from all such remarks, with this single exception, that my brother Coleridge's argument has strengthened my opinion against the motion, by proving how the plain law of England may be put in hazard by learned speculations on obscure works of doubtful import anywhere, and of no authority here.

BISHOPS.

Judgment of
Lord Denman
in *Reg. v. Can-
terbury (Arch-
bishop of)*.

“Now comes the question which presses most on my mind. Having stated my reasons for the opinion which I deliberately form, and conscientiously entertain that this never has been at any time the law of England, I must be of opinion that the Court ought to refuse the writ of mandamus; but upon that opinion I have had the greatest difficulty, and have felt the greatest possible hesitation in acting, because I feel the authority of my two learned brothers, and the ungracious appearance of refusing the opportunity of inquiry. In any ordinary set of circumstances, in the case of an enclosure, of a railway or matter of property, we should have no question whatever that the doubt of any one on the bench would have made further inquiry desirable, I should have instantly agreed. A writ of error would lie in that case to correct any opinion that might be shown on more discussion to be erroneous. But every judge must act on his own conviction. I own that my opinion is so entirely settled, and I must say so entirely unchanged by what I have heard of the argument to-day, that feeling the utmost disposition to do all that can be done to show my respect for my learned brothers, I do not think that I can consent to say for my part that this writ ought to go. I think it ought not—I feel confident that if it went it would be good for nothing—if held valid, *primâ facie*, I have no doubt that the return which would be made to it would give it a complete answer. I am satisfied that the only effect of all this would be, to keep alive the dreadful agitation and frightful state of religious, or rather let me say, theological animosity, which it is impossible not to observe in this country. There would be a delay of at least two years—probably four more days would be consumed in argument—and we cannot tell how much more when it would come into the court of error. The bishopric all that time would be vacant—perhaps other vacancies might occur, and no doubt the example here set would be followed, and in every case I should expect in the excited state of men’s minds that the archbishop would be called upon to summon all mankind to hear whether they had any thing to say against the bishop elect, and to open a court that would probably never be closed.

“We have a discretion to issue, or to withhold, the writ of mandamus. Supposing even that I thought it very doubtful how the law was, supposing that I thought that the archbishop was bound to hold a court for confirmation, still I apprehend that I should have a discretion to exercise. The Bishop of Manchester has been consecrated in spite of some attempt at opposition, and I believe it would be held that the Bishop of Manchester’s consecration cannot be questioned. This opposition is put forward before consecration; but if consecration had taken place, or even now should follow, then I apprehend that it cannot be questioned, except on the supposition that the proceeding is altogether null and void: of this I see no trace of any evidence whatever in any records in this country, only some few words scattered in ancient volumes, recording the events of a state of society the most uncertain and obscure.

“Now under all these considerations, feeling the utmost respect for my learned brethren, and the greatest regret that we do not take the same view, I must own that I feel that some deference is due also to the high person who is named as the defendant in this rule. Some deference is due to those who certify the fitness of Bishop Hampden for the office to which he is elected. Still more deference is due to the peace of the Church, and to the

tranquillity of the State. It seems to me that we should be putting everything to hazard, and leading to consequences which it is impossible to foresee, if we, who are firmly convinced that there is no such law as that upon which these parties seek to act, encouraged the smallest doubt as to its existence. Reserving my opinion on that point till I had heard all the observations of my learned brothers, and keeping my mind open to the last and free to say that this is a question which ought to be discussed, I must fairly say, with all respect for my brother Coleridge's admirable argument, that it has confirmed me in the opinion of the danger of exposing the Act of Parliament, and the most simple construction of the plainest language, and the most inveterate and universal opinion on its effect, to the speculations of those who will bring their forgotten books down, and wipe off the cobwebs from decretals and canons, before they can find one argument for disturbing the settled practice of three hundred years.

"In my opinion this rule ought to be discharged."

Rule discharged. (1)

(1) In consequence of the above decision, the promoters submitted the following case to Counsel:—

"The see of Hereford having lately become vacant, by the promotion of Dr. Musgrave to the Archbishopric of York, Dr. Hampden was, in obedience to the Queen's mandate and letters missive, elected in his room, by the Dean and Chapter of Hereford. At a Court holden by the Vicar-General of the Archbishop of Canterbury at Bow Church, on the 11th day of January last, for the purpose of confirming such election, in answer to the first citation, three clergymen (two of whom hold benefices in the diocese of Hereford) came forward by their Proctor to oppose Dr. Hampden's confirmation, and in due form of law tendered articles of objection, impeaching his orthodoxy; the Vicar-General refused to entertain the objections, or even to suffer the opposers to appear; thereupon they applied to the Queen's Bench for a Mandamus, to compel the Archbishop or his Vicar-General to hear them.

"That Court at first granted a Rule Nisi, but on cause being shown, the Judges were equally divided in opinion, and in consequence the application for the Mandamus fell to the ground.

"You are now requested on the part of the objectors to state your opinion, whether they can or ought to take any and what further steps, either by a Writ of Error, Appeal, Petition to the House of Lords, or otherwise, with a view first to establish their right to urge their objections in opposition to Dr. Hampden's confirmation, and, if successful, then to try the question of his fitness, in point of doctrine, to be confirmed and consecrated to the see of Hereford."

"OPINION.

"As the Court of Queen's Bench has given no judgment in this case, neither declaring what the law is, nor enabling the objectors

to ascertain it, we cannot suggest any other means by which redress can be secured.

"We are of opinion, that no writ of error lies from the late proceedings in the Court of Queen's Bench, that remedy being confined to cases where the writ of mandamus has issued, and it is for this very reason that, on other occasions, however unimportant (as Lord Denman admitted in his judgment), where any of the judges have expressed the slightest doubt, the Court has always allowed the writ to go, to prevent a failure of justice; the late statutes of 1 William IV., c. 21, and 6 & 7 Victoria, c. 67, having been passed expressly for the purpose of giving, by means of that writ, more easy and effectual relief.

"We are also of opinion that no appeal lies in the present case from the sentence of the Vicar-General to the Judicial Committee of the Privy Council, the want of such a power of appeal having not only been admitted, both by the bench and at the bar, during the late argument in the Court of Queen's Bench, but having also been expressly declared by Mr. Justice Patteson, in his judgment.

"We think, however, that under these circumstances, it may be desirable for the objectors to present a petition to the House of Lords, setting forth the facts of the case, and praying their lordships to take such steps as they may deem expedient for providing an adequate remedy, and for ascertaining what the law on this subject really is. As the judges of the Queen's Bench are equally divided in opinion, it is obvious that the law is at present doubtful, and that the Court is unable to remove that doubt; and it is impossible to deny that the greatest inconvenience must exist so long as the doubt remains, for not only may the very same difficulties recur on every future confirmation of a bishop, but the validity of Dr. Hampden's episcopal acts, and the exercise of his jurisdiction, will be liable to be disputed. Independently of these reasons, it

BISHOPS.

Judgment of Lord Denman in *Reg. v. Canterbury (Archbishop of)*.

BISHOPS.*Page 159. after line 12. insert*

Stat. 10 & 11
Vict. c. 98.
ss. 1—5.

Bishop to
exercise jurisdic-
tion
throughout
his diocese,
save in causes
testamentary.

Sect. 2.
Officers of
diocesan courts
to account for
all fees, &c.
received by
them.

Sect. 3.
Jurisdiction
in causes tes-
tamentary to
continue un-
altered by
change of pro-
vince, &c.

Sect. 4.
Law of Bona
notabilia to
continue un-
altered by
change of
province, &c.

Sect. 5.
Certain au-
thorities may
continue to
grant marriage
licences as
heretofore.

Stat. 10 & 11 Vict. c. 98. (An Act to amend the Law as to Ecclesiastical Jurisdiction in England), after reciting that "much inconvenience ensued from the continued suspension of the jurisdiction of the several diocesan courts in England within those parts of the dioceses which had been added thereunto under stat. 6 & 7 Gul. 4. c. 77., and that it was expedient that some remedy be thereunto applied," enacts by sect. 1., "That the bishop of every diocese in England shall by himself or his officers exercise throughout the whole of his diocese as it now is or hereafter may be limited or constituted, save only in causes and matters testamentary or relating to the administration of the personal estate of intestates, the same jurisdiction and authority which before the passing of this act he or any bishop lawfully could or might exercise by himself or his officers within any part of such diocese."

By sect. 2., "That the officers of the several diocesan and other courts shall keep an account in writing of the gross and net amount of all fees, allowances, gratuities, perquisites, and emoluments received by them respectively on account of their several offices or employments in respect of any causes or matters arising within the diocese which during the continuance of the temporary provisions of the first recited act were not within the jurisdiction of the bishop of the diocese or other ecclesiastical authority, and shall from time to time, once at least in every quarter of a year, and, on demand, at any other time, pay over the net amount thereof to the treasurer of the governors of the Bounty of Queen Anne, to be by him carried to a separate account, and retained until parliament shall provide for the appropriation thereof; and in case any person required to pay over any money under this act shall die or resign or be dismissed from his office while any such money remains unpaid by him, the executors or administrators of the person so dying, or the person himself so resigning or dismissed, shall be required to pay the balance of the money so remaining due and unpaid."

By sect. 3., "that the jurisdiction of every ecclesiastical court in England in causes and matters testamentary or relating to the administration of the personal estate of intestates shall continue unaltered by any change of province, diocese, archdeaconry, or other jurisdiction whatever within the same limits and in like manner as was by law allowed before the passing of the herein-before recited act."

By sect. 4., "that the law of Bona notabilia shall be continued unaltered by any change of province, diocese, archdeaconry, or other jurisdiction whatsoever under the authority of the first recited act as it was before the passing of the herein-before recited act."

By sect. 5., "that all authorities, save and except the authority of the bishop of whose diocese any portion has been or may hereafter be taken away and added to another diocese under the provisions of the herein-

may be presumed that the House of Lords will be disposed to entertain such a petition, as involving matters affecting its own privileges, for if Dr. Hampden's election be not duly confirmed, he has no right to a seat in that house, that right accruing only

upon confirmation, when legally performed.

"FITZROY KELLY.

"J. ADDAMS

"A. J. STEPHENS

"EDWARD BADELEY."

"Temple, Feb. 18, 1848."

before recited act, shall continue to grant marriage licences in the same manner and within the same district as they might have done before the passing of the said act: provided always, that nothing herein contained shall be construed to interfere within the jurisdiction or concurrent jurisdiction, as the case may be, of the bishops of the several dioceses in England to grant marriage licences in and throughout the whole of their dioceses, as such are now or hereafter may be limited or constituted."

Under sect. 6., the temporary provisions of stat. 6 & 7 Gul. 4. c. 77., continued by stat. 7 & 8 Vict. c. 68., ceased on 2d November, 1847.

Under sect. 7., so much of the act as is therein-before contained came into force on November 1, 1847, and will continue until August 1, 1848, and, if parliament be then sitting, until the end of the then session of parliament.

By sect. 8., where under the provisions of stat. 6 & 7 Gul. 4. c. 77. any parish or place shall have been brought within any diocese to which it did not belong before the passing of that act, and any act of jurisdiction or authority shall have been exercised as to such parish or place since its enactment, and before November 1, 1847, by the bishop or any officer of the bishop of the diocese or any archdeacon of the diocese to which such parish or place belonged, either before or since the passing of stat. 6 & 7 Gul. 4. c. 77. which does not conflict with any similar act of jurisdiction or authority previously and since the passing of that act exercised as to such parish or place by any other bishop or officer of any other bishop or archdeacon having or claiming to have jurisdiction as to such parish or place, the same shall be deemed as good and valid as if such parish or place had then been wholly and undoubtedly within the diocese and jurisdiction of the bishop by whom, or by any officer of whom, such act of jurisdiction or authority shall have been exercised.

By sect. 9., "Every person who shall have been appointed after the passing of stat. 6 & 7 Gul. 4. c. 77., except as therein excepted, or who shall be appointed after the passing of this act, to the office of judge, registrar, or other officer of any ecclesiastical court in England, shall hold the same subject to all regulations and alterations affecting the same which may hereafter be made by authority of parliament; nor shall any person by his appointment to any such office acquire any claim or title to compensation in case the same be hereafter altered or abolished by act of parliament."

BISHOPS.

Stat. 10 & 11
Vict. c. 98.

ss. 6—9.

Jurisdiction of
bishops to
grant licences
not to be in-
terfered with.

Sects. 6 & 7.

Temporary
provisions of
6 & 7 Gul. 4.
c. 77. con-
tinued by

7 & 8 Vict.
c. 68. to

cease on
2d Nov. 1847.

Sect. 8.
Commence-
ment and
continuance
of act.

Confirming
certain acts
of juris-
diction.

Sect. 9.
Officers ap-
pointed
under this
act to be
subject to
regulations
hereafter
made by
parliament.

Page 163. in note (1), insert

Stat. 10 & 11 Vict. c. 108. (An Act for establishing the Bishopric of Manchester, and amending certain Acts relating to the Ecclesiastical Commissioners for England), after reciting stats. 6 & 7 Gul. 4. c. 77., 3 & 4 Vict. c. 113., 4 & 5 Vict. c. 39., and 6 & 7 Vict. c. 77.; and reciting that the Queen had on the 10th of February 1847, issued a commission to certain persons therein named, directing them to consider the state of the several bishoprics in England and Wales with special reference to the intention, that a measure should be submitted to parliament for continuing the bishoprics of Saint Asaph and Bangor as separate bishoprics, and for establishing forthwith a bishopric of Manchester; and that the commissioners had made their first

Stat. 10 & 11
Vict. c. 108.

BISHOPS.**Their first report.****Recommendations.****Repeal of repugnant enactments ; and powers of former acts extended to this act. ;****Number of lords spiritual not to be increased.**

report to the Queen, bearing date the 20th of April 1847, and had in their report recommended, That the diocese of Saint Asaph consist of the whole counties of Flint and Denbigh, and such parts of the counties of Salop and Montgomery as are now in that diocese, except the deanery of Ceifeiliog in the last-mentioned county ; and that the diocese of Bangor consist of the whole counties of Anglesea, Carnarvon, and Merioneth, and the deaneries of Ceifeiliog and Arwstley in the county of Montgomery ; and that the diocese of Chester consist of the county of Chester and the deanery of Warrington in the county of Lancaster, except the parish of Leigh ; and that the new bishopric of Manchester be forthwith founded, and endowed out of the revenues at the disposal of the Ecclesiastical Commissioners for England applicable to episcopal purposes ; and that the diocese of Manchester consist of such parts of the deaneries of Kendal and Kirkby Lonsdale as are in the county of Lancaster, and of the deaneries of Amounderness, Blackburn, Manchester, and Leyland, and the parish of Leigh in the deanery of Warrington, all in the same county ; and that an archdeaconry of Liverpool be founded in the diocese of Chester, and that such archdeaconry comprise the deanery of Worrall in the county of Chester and the deanery of Warrington (except the parish of Leigh) in the county of Lancaster ; and reciting that it was expedient that these recommendations should be carried into effect, with such modifications as might be found necessary, and that certain of the provisions of the recited acts should be altered and amended: repeals so much and such parts of the recited acts as provide for or apply to the union of the bishoprics, sees, or dioceses of Saint Asaph and Bangor, and also any orders of her majesty in council relating to the said union, or to the new see or diocese of Manchester ; and continues, and extends, and applies all the powers and authorities vested in her majesty in council, and in the Ecclesiastical Commissioners for England, by the first and secondly recited acts, with reference to the matters therein respectively contained, and all other the provisions of the same acts relating to schemes and orders prepared, made, and issued for the purposes thereof, and to modifications and variations therein, to her majesty in council, and to the said commissioners, and to all schemes and orders to be prepared, made, and issued by them respectively, for the purpose of carrying into effect the foregoing recommendations, as fully and effectually as if those powers, authorities, and other provisions were repeated in this Act: and enacts, “ that the number of Lords spiritual now sitting and voting as lords of parliament shall not be increased by the creation of the bishopric of Manchester ; and whenever there shall be a vacancy among the lords spiritual by the avoidance of any one of the sees of Canterbury, York, London, Durham, or Winchester, or of any other see which shall be filled by the translation thereto from any other see of a bishop at that time actually sitting as a lord of parliament, such vacancy shall be supplied by the issue of a writ of summons to the bishop who shall be elected to the same see ; but if such vacancy be caused by avoidance of any other see in England or Wales, such vacancy shall be supplied by the issue of a writ of summons to that bishop of a see in England or Wales who shall not have previously become entitled to such writ ; and no bishop who shall be hereafter elected to any see in England or Wales, not being one of the five sees above named, shall be entitled to have a writ of summons, unless in the order and according to the conditions above prescribed.”

DEPRIVATION.

DEPRIVATION.

Page 434. in note (4), insert

Vide etiam 1 Robertson, 380, where the learned editor submits for consideration the following note in reference to some of the points involved in the above case :

“ In the patent of appointment of a judge of the Arches Court are these words :— ‘ We do for ourselves and successors give, and grant to you the said A. B. our power and authority legally to inflict any ecclesiastical censures whatsoever.’

“ What is the meaning of the words ‘ any ecclesiastical censures whatsoever?’

“ It is somewhat remarkable, considering how often the authority and power of the Ecclesiastical Courts have in the Temporal Courts been called in question, and the many statutes in which the term ‘ Censures of the Church’ is to be found, that, as far as the Editor is aware, there has never yet been a question or determination in a Temporal Court of what the Censures of the Church consist.

“ By the general Canon Law of Europe, ‘ Ecclesiastical Censures’ are commonly held to be confined to Interdict, Suspension, and Excommunication.(1) But the word, ‘ Censura,’ has not always this circumscribed meaning; it is sometimes used in the sense of *Severitas Canonica*, which term denotes every other punishment of the Church.(2) Moreover, our statute law would seem impliedly to recognise the use of the word ‘ Censure’ in the larger acceptation, as explained by Lyndwood.(3)

“ In the next place, the word ‘ whatsoever,’ to which some meaning must be assigned,—it is a word of amplification,—will probably lead to the conclusion that the term ‘ Censures’ in the patent is used in the larger sense. It would be difficult, too, to understand on what principle the judge of the Arches Court has the authority, which is definitely settled, to deprive, if the patent is not so to be construed; for though it is clear, according to all strict principles of construction, the judge of that Court is not included with chancellors and others mentioned in Canon 122, still, it is equally clear, no judge can exercise a greater authority than is delegated to him.

“ If it be conceded, then, that the term in the patent, ‘ any Ecclesiastical Censures whatsoever’ is, as the writer of this note submits, to be taken in the wider sense; the question next to be answered is, has the judge of the Arches Court authority to pronounce a sentence of degradation? The answer is,—No; and for this only reason—an archbishop or bishop has not alone power to degrade one in the higher orders of the Church. The power to inflict degradation originally appertained to a synod or convocation, and that authority has never yet been delegated lower than to a certain number of bishops, proportioned to the rank or order of a defendant, except, perhaps, in a case of heresy.(4)

“ On reference to the sentence as signed by the learned judge in the present

(1) X. 5. 40. 20.; Lyndw. 11. 1.; “ *Excussis* ” v. “ *Censuræ*,” p. 91.; Van Esp. pars iii. tit. xi. c. iii.

(2) Lyndw. v. 15.; “ *Item*,” v. “ *Censuram Canoniam*,” p. 322.

(3) See stat. 1 Eliz. c. 2. s. 23. & stat. 29 Car. 2. c. 9. s. 2.

(4) X. in sexto. 5. 9. 2.; Van Esp. pars iii. tit. xi. c. 1.; 12 Co. 57.

DEPRIVATION.

case, it would seem to be an unlimited suspension, which is by some learned canonists termed a deposition negative. Had he thought fit, it is submitted, for reasons which are deducible from above, he might have pronounced a sentence of positive deposition, without regard to what would have been the effect of such a sentence;—a point, which was not then to be discussed, and which could rarely arise in any court.

“The distinction between degradation, deposition, and suspension, is given by J. de Athon (1), in these words:—‘*Depositus dicitur, qui privatus est beneficio et officio, licet non solenniter. Degradatus dicitur, qui utroque est privatus solenniter, insigniis sibi ablatiis Suspensus autem dicitur, qui est privatus utroque ad tempus, non in perpetuum.*’ The difference in the effect between deposition, in the sense of the word, as used by J. de Athon, and suspension, limited or unlimited, will be found more fully considered by Van Espen.” (2)

EXCOMMUNICATION.

Page 541. in note (6), insert

Stat. 2 & 3
Gul. 4. c. 93.
a. 1.

Where persons residing beyond the jurisdiction of any ecclesiastical courts are cited to appear, &c. and refuse obedience, the judge thereof may pronounce them contumacious, and certify the same to the lord chancellor, &c. within ten days, and thereupon a writ de contumacia capiendo shall issue unless the person be a peer, &c.

Stat. 2 & 3 Gul. 4. c. 93. (An Act for enforcing the process upon contempts in the Courts Ecclesiastical of England and Ireland), after reciting that great inconvenience had been found to arise by reason of the process of the several ecclesiastical courts in England and Ireland being inoperative and unavailable out of the limits of the respective jurisdictions of such courts, and against persons having privilege of peerage, lords of parliament, and members of the House of Commons; and that in many instances a failure of justice had thereby ensued: and that it was expedient, for remedy thereof, that the process of those several courts, and the means of enforcing obedience to it, should be of equal force and have the like operation, in England and Ireland, and as well against persons having privilege of peerage, lords of parliament, and members of the House of Commons, as against all other his Majesty's subjects: enacts, by sect. 1, “that in all causes which according to the laws of this realm are or may be cognisable in any of the several ecclesiastical courts, as well in that part of the United Kingdom of Great Britain and Ireland called England as in that part of the same United Kingdom called Ireland, when any person or persons, as well those which have or hereafter shall have privilege of peerage, or are or hereafter may be peers of parliament or members of the House of Commons, as all others who shall happen to be domiciled or residing either in England or in Ireland, and beyond the limits of the jurisdiction of the court in which such causes have been or shall have been respectively instituted or commenced, or shall be depending, having been duly cited to appear in any such ecclesiastical court, whether in England or in Ireland, or required to comply with any lawful order or decree, as well final as interlocutory, which hath been or shall have been made by any such court respectively, shall neglect or refuse to pay obedience to any such lawful order or decree, or when any such person or persons shall commit a contempt in the face of such court, or any other contempt towards

(1) Otho. “*Licet*,” v. “*Suspensi*,” p. 45.

(2) Pars iii. tit. xi. c. xi.

such court, or the process thereof, it shall be lawful for the judge or judges out of whose court the citation or process hath already issued or may hereafter issue, or whose lawful orders or decrees have not or shall not have been obeyed, or before whom such contempt in the face of the court shall be committed, or by whose order or authority such process in respect of or towards which any such contempt shall have been committed has been or shall be awarded or issued, or the successor or successors in office of such judge or judges respectively, to pronounce such person or persons contumacious and in contempt, and within ten days after such person or persons shall have been so pronounced to be contumacious and in contempt to signify the same to the lord chancellor, lord keeper or lords commissioners for the custody of the great seal of England for the time being respectively, whenever the person or persons who shall have been so pronounced contumacious and in contempt shall be domiciled or residing in England, and within the like period of ten days to signify the same to the lord chancellor, lord keeper or lords commissioners for the custody of the great seal of Ireland for the time being respectively, whenever the person or persons who shall have been so pronounced contumacious and in contempt shall be domiciled or residing in Ireland, in the form annexed to an act of parliament made and passed in the fifty-third year of the reign of his late majesty King George the Third, intituled, 'An Act for the better regulation of Ecclesiastical Courts in England, and for the more easy recovery of church rates and tithes;' and thereupon, and in case the person so reputed to be in contempt shall not be a peer, lord of parliament, or member of the House of Commons, a writ de contumace capiendo shall issue from his Majesty's said High Court of Chancery in England or in Ireland, as the case may happen, to be directed to the same persons to whom writs de excommunicato capiendo were by law returnable before the passing of the said act of parliament, and the same shall be returnable in like manner as the writ de excommunicato capiendo had been theretofore by law returnable, and shall have the same force and effect as the last-mentioned writ; and all rules and regulations not altered by the said act of the fifty-third year of his said majesty George the Third, and which before the passing the same act applied to the said writ de excommunicato capiendo, and the proceedings following thereupon, and particularly the several provisions contained in a certain act passed in the fifth year of the reign of Queen Elizabeth, intituled, 'An Act for the due execution of the writ de excommunicato capiendo,' shall extend and be applied to the said writ de contumace capiendo, and the proceedings following thereupon, as if the same were herein particularly repeated and enacted; and the proper officers of the said two several High Courts of Chancery in England and Ireland, as the case may happen to be, are hereby authorised and required to issue such writ de contumace capiendo accordingly; and all sheriffs, gaolers, and other officers in England and in Ireland, as the case may happen to be, are hereby required and authorised to execute the same, by taking and detaining the body of the person or persons against whom the said writ shall be so directed to be executed; and upon the due appearance of the party or parties so cited and not having obeyed as aforesaid, or the due submission of the party or parties so having committed a contempt in the face of the court or otherwise, as hereinbefore is mentioned, the judge or

EXCOMMUNI-
CATION.

Stat. 2 & 3
Gul. 4. c. 93.
s. 1.

53 Geo. 3.
c. 127.

All regulations
and provisions
applying to the
writ de excom-
municato, and
proceedings
thereupon,
shall be ap-
plied to the
writ de contu-
mace.
5 Eliz. c. 23.

Upon the ap-
pearance or
submission of
the party, the
judge may or

**EXCOMMUNI-
CATION.**

Stat. 2 & 3
Gul. 4. c. 93.
der him to be
absolved or
discharged.

Sect. 2.
Where persons
possessed of
estates, &c. in
England neg-
lect to pay
money ordered
by the said
courts, the
judges may
pronounce
such persons
contumacious,
and certify the
same to the
lord chancellor,
who shall
cause process
of sequestra-
tion to issue
against the
estate of the
party in Eng-
land.

judges of such Ecclesiastical Court, whether in England or in Ireland, as the case may be, shall pronounce such party or parties absolved from the contumacy and contempt aforesaid, and shall forthwith make an order upon the sheriff, gaoler, or other officer in whose custody he, she, or they shall be, in the form to the said act of the fifty-third year of the reign of his said majesty George the Third annexed, for discharging such party or parties out of custody; and such sheriff, gaoler, and other officer shall, on the said order being shown to him, so soon as such party or parties shall have discharged the costs lawfully incurred by reason of such custody and contempt, forthwith discharge him, her, or them."

By sect. 2., "that in all such cases as are hereinbefore mentioned, and which are or may be cognisable in any or either of the several herein before-mentioned courts, when any person or persons, as well such person or persons as have or shall hereafter have privilege of peerage, or are or shall hereafter be lords of parliament or members of the House of Commons, as others who shall happen to be domiciled or residing either in England or in Ireland, have been or shall have been ordered or required, by the lawful order or decree, final or interlocutory, of any such court respectively, to pay any sum or sums of money, and when any such person or persons, after having been duly monished, shall refuse or neglect to comply with such monition, and to pay the sum or sums of money therein ordered to be paid by him or them, within the time and in the manner in any such order or decree mentioned or expressed, or a peer or lord of parliament or member of the House of Commons shall refuse or withhold obedience, or shall in any way neglect to perform or shall not perform any decree or order, final or interlocutory, of such courts as aforesaid, it shall be lawful for the judge or judges who shall have made such order or decree, or his or their successor or successors in office, to pronounce the person or persons so neglecting or refusing to comply with such order or decree contumacious and in contempt, and within ten days after such person or persons shall have been so pronounced contumacious and in contempt to cause a copy of such order or decree, under the seal of the court wherein the same shall have been made, or under the hand or hands of such judge or judges, or one of them, to be exemplified, and certified to the lord chancellor, lord keeper or lords commissioners for the custody of the great seal of England for the time being respectively, whenever the person or persons who shall have been so pronounced contumacious shall be domiciled or residing, or shall be seised or possessed of or entitled to any real or personal estate, goods, chattels, or effects, situate, lying, or being in England; and the said lord chancellor, lord keeper or lords commissioners for the custody of the great seal of England, shall forthwith cause such copy of such order or decree, when it shall be presented to them respectively, so exemplified, to be enrolled in the rolls of the High Court of Chancery of England, and shall thereupon cause process of sequestration to issue against the real and personal estate, goods, chattels, and effects, in England, of the party or parties against whom such order or decree shall have been made, in order to enforce obedience to and performance of the same, in the same manner and form and with the like power and effect, as if the cause wherein such order or decree shall have been made had been originally cognisable by and instituted in the said Court of Chancery in England, and as if all and every

the process of the said Court of Chancery in England ordinarily issuing in causes there pending antecedent to process of sequestration had been duly issued and returned in the last-mentioned Court; and it shall and may be lawful for the said lord chancellor, lord keeper or lords commissioners of the great seal in England, to make such order and orders in respect of or consequent upon such sequestration, or in respect of the real or personal estate, goods, chattels, or effects sequestrated by virtue thereof, as he or they shall from time to time think fit, or for payment of all or any of the monies levied or received by virtue thereof into the Bank of England, with the privity of the accountant-general of the said Court of Chancery in England, to the credit and for the benefit of the party or parties who shall have obtained such order or decree, if the same was for payment of money, or if not, to the credit of the High Court of Chancery; and the governor and company of the Bank of England are hereby authorised and required to receive and hold all such monies, subject to the orders of the said Court of Chancery: provided always, that no such monies shall be charged with or subject to poundage when the same shall be paid out by order of the said Court."

EXCOMMUNI-
CATION.

Stat. 2 & 3
Gul. 4. c. 9

By sect. 3., "that in all such causes as are hereinbefore mentioned, and which are or may be cognisable in any or either of the several hereinbefore mentioned courts, when any person or persons, as well such person or persons as have or shall hereafter have privilege of peerage, or are or shall hereafter be lords of parliament or members of the House of Commons, as others, who shall happen to be domiciled or residing either in England or in Ireland, hath or have or shall have been ordered or required by the lawful order or decree, final or interlocutory, of any such court respectively, to pay any sum or sums of money, or to do any other act or thing, and when any such person or persons, after having been duly personally served with a copy or copies of such order or decree, shall refuse or neglect to comply therewith, or to pay the sum or sums of money therein ordered to be paid by him or them, or to do the act or thing required by such order to be done, within the time and in the manner in any such order or decree mentioned or expressed, it shall be lawful for the judge or judges who shall have made such order or decree, or his or their successor or successors in office, to pronounce the person or persons so neglecting or refusing to comply with such order or decree contumacious and in contempt, and within ten days after such person or persons shall have been so pronounced contumacious and in contempt to cause a copy of such order or decree, under the seal of the court wherein the same shall have been made, or under the hand or hands of such judge or judges, or one of them, to be exemplified, and certified to the lord chancellor, lord keeper or lords commissioners for the custody of the great seal of Ireland for the time being respectively, whenever the person or persons who shall have been so pronounced contumacious and in contempt shall be domiciled or residing, or shall be seised or possessed of or entitled to any real or personal estate, goods, chattels, or effects, situate, lying, or being in Ireland, and within the like period of ten days and after such last-mentioned person or persons shall have been pronounced contumacious and in contempt to cause a copy of such order or decree to be exemplified, and certified in manner hereinbefore mentioned to the barons of his Majesty's Court of Exchequer in that

Sect. 3.
The like pro-
vision as to
persons pos-
sessed of
estates, &c.
Ireland.

EXCOMMUNI-
CATION.Stat. 2 & 3
Gul. 4. c. 93.

part of the United Kingdom called Ireland, whenever the person or persons who shall have been so pronounced contumacious and in contempt shall be domiciled or residing, or shall be seised or possessed of or entitled to any real or personal estate, goods, chattels, or effects, situate, lying, or being in Ireland; and the said lord chancellor, lord keeper or lords commissioners for the custody of the great seal of Ireland, shall forthwith cause such copy of such order or decree, when it shall be presented to them respectively, as exemplified, to be enrolled in the rolls of the High Court of Chancery in Ireland, and shall thereupon cause process of sequestration to issue against the real and personal estate, goods, chattels, and effects, in Ireland, of the party or parties against whom such order or decree shall have been made, in order to enforce obedience to and performance of the same, in the same manner and form, and with the like power and effect, as if the cause wherein such order or decree shall have been made had been originally cognisable by and instituted in the said Court of Chancery in Ireland, and as if all and every the process of the said Court of Chancery in Ireland ordinarily issuing in causes there pending antecedent to process of sequestration had been duly issued and returned in the last-mentioned Court; and it shall and may be lawful for the said lord chancellor, lord keeper or lords commissioners of the great seal in Ireland, to make such order or orders in respect of or consequent upon such sequestration, or in respect of the real or personal estate, goods, chattels, or effects sequestered by virtue thereof, as he or they shall from time to time think fit, or for payment of all or any of the monies levied or received by virtue thereof into the Bank of Ireland, with the privity of the accountant-general of the said Court of Chancery in Ireland, to the credit and for the benefit of the party or parties who shall have obtained such order or decree, if the same was for payment of money, or if not, then to the credit of the said High Court of Chancery; and the governor and company of the said Bank of Ireland are hereby authorised and required to receive and hold all such monies, subject to the orders of the said Court of Chancery in Ireland; provided always, that no such monies shall be charged with or subject to poundage for the use of the said Court of Chancery in Ireland, or otherwise, when the same shall be paid out by order of the last-mentioned Court."

Sect. 4.
Act not to
extend to
orders made
six years since.

By sect. 4., "that none of the provisions of this act shall extend to any order or decree, or the refusing or neglecting to perform any order or decree, which shall have been made more than six years before the passing of this act."

Sect. 5.
Limitation of
actions.

By sect. 5., "that if any action or suit shall be brought or commenced for any thing done in pursuance of this act, every such action or suit shall be commenced within three calendar months next after the fact committed, and not afterwards, and shall be laid and tried in the city or county wherein the cause of action shall have arisen, and not elsewhere; and the defendant or defendants in such action or suit shall and may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon, and that the same was done in pursuance or by the authority of this act; and if the same shall appear to have been so done, or if any action or suit shall be brought after the time limited for bringing the same, or shall be laid in any other city, county, or place than as aforesaid, then the judge shall find for the defendant or defendants; and upon such verdict or

General issue.

if the plaintiff or plaintiffs shall be nonsuited, or suffer a discontinuance of their action or suit after the defendant or defendants shall have appeared, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall have treble costs, and shall have such remedy for the same as any defendant or defendants hath or have for costs of suit in any other case by law."

EXCOMMUNI-
CATION.

Treble costs.

By stat. 3 & 4 Gul. 4. c. 41. s. 28., the judicial committee of the Privy Council has and enjoys in all respects such and the same power of punishing contempts and of compelling appearances, and his Majesty in Council has and enjoys in all respects such and the same powers of enforcing judgments, decrees, and orders, as are exercised by the High Court of Chancery or the Court of King's Bench (and both in personam and in rem), or as are given to any court ecclesiastical by stat. 2 & 3 Gul. 4. c. 93; and all such powers as are given to courts ecclesiastical, if of punishing contempts or of compelling appearances, are to be exercised by the said judicial committee, and if of enforcing decrees and orders are to be exercised by his Majesty in Council, in such and the same manner as the powers in and by such act of parliament given, and are to be of as much force and effect as if the same had been by this Act expressly given to the said committee or to his Majesty in Council."

Stat. 3 & 4
Gul. 4. c. 41.
s. 28.

Stat. 3 & 4 Vict. c. 93. (An Act to amend the act for the better regulation of Ecclesiastical Courts in England), after reciting the expediency of making further regulations for the release of persons committed to gaol under the writ de contumace capiendo: enacts, that thenceforth "it shall be lawful for the judicial committee of her Majesty's most honourable Privy Council, or the judge of any ecclesiastical court, if it shall seem meet to the said judicial committee or judge, to make an order upon the gaoler, sheriff, or other officer in whose custody any party is or may be hereafter, under any writ de contumace capiendo already issued or hereafter to be issued, in consequence of any proceedings before the said judicial committee or the judge of the said ecclesiastical court, for discharging such party out of custody; and such sheriff, gaoler, or other officer shall on receipt of the said order forthwith discharge such party: provided always, that no such order shall be made by the said judicial committee or judge without the consent of the other party or parties to the suit: provided always, that in cases of subtraction of church rates for an amount not exceeding five pounds where the party in contempt has suffered imprisonment for six months and upwards, the consent of the other parties to the suit shall not be necessary to enable the judge to discharge such party, so soon as the costs lawfully incurred by reason of the custody and contempt of such party shall have been discharged, and the sum for which he may have been cited into the ecclesiastical court shall have been paid into the registry of the said court, there to abide the result of the suit; and the party so discharged shall be released from all further observance of justice in the said suit: and enacts, that any such order may be in the following form:—

Stat. 3 & 4.
Vict. c. 93.
Sect. 1.

Privy council
may order dis-
charge of per-
sons in custody
under writ de
contumace
capiendo.

Sect. 2.
Form of order.

"To the sheriff [gaoler, or keeper, as the case may be] of —, in the county of —.

"Forasmuch as good cause hath been shown to us [or me] [here insert the description of the judicial committee or judge, as the case may be],

**EXCOMMUNI-
CATION.**

wherefore A. B., of —, now in your custody, as it is said, under a writ de contumace capiendo, issued out of [*here insert the description of the court out of which the writ issued*], in a suit in which [*here insert the description of the parties to the suit*] should be discharged from custody under the said writ; we [*or I*], therefore, with the consent of the said [*here insert the description of the parties consenting*], command you, on behalf of our sovereign lady the Queen, that if the said A. B. do remain in your custody for the said cause and no other, you forbear to detain him [*or her*] any longer, but that you deliver him [*or her*] thence, and suffer him [*or her*] to go at large, for which this shall be your sufficient warrant.

“ Given under the seal of —, at —, the — day of —, in the year of our Lord —.

“ A. B. { Registrar or
Deputy Registrar.”

[*or as the case may be*].

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Page 723. after line 13. insert

Reg. v. Chadwick, marriage with the sister of the deceased wife held to be illegal.

At the session of oyer and terminer and gaol delivery held at Liverpool, on the 6th of December, 1846, before Mr. Baron Rolfe and Mr. Justice Wightman, one Chadwick was tried on an indictment which charged him with the crime of bigamy, in marrying Eliza Bostock, his former wife, Ann Fisher, being still alive: and the jury having found specially that the prisoner, on the 27th of June, 1825, married Hannah Fisher; that, after her death, he, on the 14th of September, 1845, married Ann Fisher, a sister of his deceased wife; and that, on the 23d of March, 1846, he married Eliza Bostock, Ann Fisher being still alive; but that whether or not he was guilty of the said crime of bigamy they were altogether ignorant, and prayed the advice of the Court thereon:— Mr. Justice Wightman directed an acquittal, on the ground that the prisoner's marriage with Ann Fisher was void by stat. 5 & 6 Gul. 4. c. 54.

Subsequently, the record was removed into the Court of Queen's Bench, by writ of error; and the case came on to be argued before the Court *in banco*, in Michaelmas term, 1847, when the marriage of the defendant in error, with the sister of his deceased wife, was declared to be null and void.

Judgment of Lord Denman in Reg. v. Chadwick (in error).

LORD DENMAN, — “ In this case the Queen is the plaintiff in error on a writ of error brought against a judgment pronounced at Liverpool upon a special verdict, which found and treated a certain marriage as void, when it was contended that that marriage was binding. The only question is, whether that marriage is void by the law of England: if it is, the judgment must stand; if it is not, the plaintiff in error is entitled to our judgment. This depends entirely upon the statute of the 5 & 6 Gul. 4. c. 54., the first section of which recites ‘ that marriages between persons within the prohibited degrees are voidable only by sentence of the Ecclesiastical Court, pronounced during the lifetime of both the parties thereto; ’ and proceeds to say that those marriages already contracted shall be held good. And the second section enacts, ‘ that all marriages which shall hereafter be cele-

brated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever.' I do not advert to the circumstances under which that statute was passed, or which brought it about. I certainly happen to know much more upon that subject than commonly falls to the lot of any of us with regard to acts of Parliament, because at that time the Great Seal was not in the hands of the Chancellor, and I presided in the House of Lords. But I do not advert in any degree to the facts which were then in contemplation. I look only to the words of the first and second clauses taken together, and I proceed to inquire what are within the words of the second clause, 'marriages celebrated between persons within the prohibited degrees of consanguinity or affinity.' Now it appears to me, — indeed, it is universally admitted, that that depends entirely upon the meaning and effect of the statute of the 32 Hen. 8. c. 38., which was passed during the reign of a monarch who certainly dealt very lightly with his own contracts, and with the principles of justice and humanity. In the twenty-fifth year of his reign he had contracted a marriage, or intended to do so (I forget which state of things existed at that moment), with Anne Boleyn, and persuaded his parliament to pass an act concerning the king's succession, which annulled the marriage which he had previously contracted with Queen Catherine of Arragon. That marriage was annulled by the parliament, and in the course of that act, not at all with a view to that particular marriage, but for the sake of preventing the great mischiefs arising from uncertainty in marriage for the future, the parliament most wisely introduced a general enactment of a most beneficial character. It recites, 'that many inconveniences had fallen, as well within this realm as others, by reason of marrying within the degrees of marriage prohibited by God's law;' and then it proceeds to state what, under that act of parliament, shall be considered as marriages prohibited by God's law, and so not valid marriages. In the enumeration which is there given, a marriage contracted with the sister of a former wife is included. If that act of parliament is in force, it decides the present case. It was, however, repealed by an act of the 28th of the same king, in which it pleased that monarch to set aside his marriage with Anne Boleyn, to declare it, for a strange reason, altogether void *ab initio*, and to prescribe what should be the course of succession to the crown, limiting it first to his own issue by Lady Jane Seymour, and at the last giving himself the power of disposing of the crown by will. But in that statute the same list of prohibited marriages is included. I do not dwell upon the distinction between the words 'degrees' and 'marriages,' but I look at it according to the clear intent of the legislature; and there again that most wholesome and beneficial provision is repeated, that marriages within those degrees shall be considered to be prohibited by God's law, and shall be void by act of parliament. Now the first of these acts was repealed for the sake of annulling the marriage with Catherine of Arragon, of putting the Princess Mary out of the succession to the Crown, and of limiting the crown upon the issue of Anne Boleyn; and the second act was passed for the purpose of repealing that provision, and limiting the crown in a new line. Then, afterwards, in the 32nd year of the reign of Henry VIII. the act passed to which we have

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been particularly referred. The second of these acts, however, is repealed in the first year of Queen Mary's reign, and in reference to that it is, I think, very important to remark that if the intention had been to deny the declaration as to prohibited degrees in those former acts of parliament — if it had been intended to say such marriages already prohibited are and shall be lawful, very simple words would not only have served that end, but would at once have established the validity of the marriage of King Henry with Queen Catherine, and would have established the legitimacy of Mary and her right to the crown. Nothing of that kind was done; but though the latter act was repealed, and their marriage was declared good, it was declared good upon a great variety of grounds; and among all the arguments that can be urged in favour of a marriage *de facto* afterwards made good by act of parliament, I may refer to the recital of the great wisdom of those under whose sanction the marriage was contracted, the length of years that Queen Catherine had lived with King Henry as his wife, the offspring which she had conceived by him, and also the bribery and corruption under which the opinions of foreign universities, and possibly of the universities of England, which long resisted the change, are alleged to have been obtained. The object, therefore, of that act was to declare the succession to the crown, to take care that Mary's title should be good and undoubted, and not at all to affect that general law laying down the rule for the marriages of all the king's subjects, which it was the intention of the 25 Hen. 8. and of the 28 Hen. 8. to establish as the rule of life for the future, taking upon themselves to declare what marriages were prohibited by the Levitical law, and, in my opinion, using that as a synonymous expression to being 'prohibited by the law of God.' One of the facts upon which the validity of the marriage of Queen Catherine with Henry VIII. depended, might be the non-consummation of her marriage with the elder brother of Henry VIII. And here I may observe, by the way, that if the appeal had been directed to holy writ, that marriage would, undoubtedly, have been a good one; because it is a case of a second brother succeeding to the wife of the elder brother, he having died without offspring; but that was not supposed, and the question whether that marriage was consummated, was made a very important one in the consideration of the whole matter. It is perfectly well known that Queen Catherine when they appeared before Campejus, appealed directly to the king's personal knowledge, that she had come a virgin to his embraces. She tendered her oath to the same effect, and Queen Mary must have felt that the honour of her mother was more directly concerned in that point than in any other; that was probably the leading motive in the mind of Queen Mary with respect to the declaration of the succession to the Crown, and the validity of that marriage. It was remarkably discussed in various ways, and it is also a well-recorded fact, that when the king set it aside a convocation, which met twenty-seven years after the time of the contracting of that marriage, actually came to the decision, in point of fact, that there was a consummation of that marriage with this youth of fifteen, as if they had come to the knowledge of it by the trial of an issue by a jury. These things appear to me to be of some importance, as showing the object for which these acts passed, perfectly independent of that general law to which I have referred, 32 Hen. 8.; this provision, as I have stated, I consider to be one passed for a general and a most

beneficial purpose. In truth, that was a law merely for carrying on the Reformation: but after denying the assumed power of the pope in a great number of instances, it applies the new reformation to marriages. These formerly had been declared invalid by the pope, in respect of pre-contracts, and the act denies him all power to interfere with those pre-contracts; then reciting the great inconveniences and scandal which had arisen from such proceedings on the part of the pope, it lays down this liberal and well-considered rule on the subject 'that from and after' such a day 'every such marriage as within this church of England shall be contracted between lawful persons (as by this act we declare all persons to be lawful that be not prohibited by God's law to marry), shall be deemed and taken to be lawful, and that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees.' That is the evil to be avoided, that the pope should, by inquiring into private circumstances of pre-contracts between such parties, set aside a marriage publicly had and solemnised, followed with offspring, and sanctioned and strengthened by a cohabitation perhaps of twenty years. It was not at all important, when that act passed, to consider what marriages should be declared good, or what should be the rule, if there was any rule existing at that time. In my opinion that rule had been distinctly laid down by the two former statutes. The second repealing the first, and the act of Queen Mary repealing the second, are not, in my opinion, directed to that object at all; and I think that the prohibition declared by those acts to be the prohibition of God's law is left wholly untouched by this particular act with regard to pre-contracts. Now I found that opinion not only upon the nature of those acts of parliament, but also very much upon the object with which, as the learned counsel in his long and eloquent speech said, this act was passed. The object is certainty. We are told that certainty is to be obtained by referring the question of marriage to the opinion of judges upon that which is contained in holy writ. What judges? Nobody doubts but that the only judges upon questions of marriage in those times were ecclesiastical judges, of whom so much jealousy was justly entertained, and who had upon so many occasions acted a capricious and most oppressive part with regard to the community for their own lucre, as is adverted to in these acts of parliament; and yet, to secure certainty, and to prevent the inconveniences and the miseries that arise from the uncertain state of the law of marriage, we are told that the wise and public-spirited men who lived in the time of Henry, and who took the opportunity of promoting the public weal at the time he was consulting his own selfish gratifications, referred it to those spiritual courts to say in each particular case what was the law of God, and that by direct reference to the Scriptures. What Scriptures? If I am to be the judge, to pass a judgment upon what the Scriptures mean, am I to be told that I am bound by any particular translation of them? If the law of God was delivered in the Hebrew language, am I to be bound by any translator who tells me that the Hebrew language means so and so? It is impossible; that is one of the stumbling-blocks at the very threshold of such an inquiry; and we have had a specimen upon the present occasion. I believe six whole days have been consumed in the discussion of this subject, in which, I think, no less than six different interpretations have been

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put upon the text of Scripture as it presents itself to us in the Old Testament. If it were desired to launch important interests upon a sea of doubt and controversy and eternal litigation, it would be most effectually done by calling upon the Spiritual Courts in the first place to adjudge what in their opinion the law of God ordained, and then referring it, in a case of prohibition, to the Common Law Courts to make inquiry upon this subject. Are we to enter into the question of what the particular opinion of the Scribes and Pharisees upon such a subject was? Are we to talk about the Caraites and Talmudists as if we understood their controversy? Are we to know under what circumstances the Jewish lawyers and judges dealt with those cases, and to form ourselves into a Court of Error from any judgment that may have there been passed? Or can we tell, as has been repeatedly urged upon us, that for so many years the practice of the Jews was to hold such marriages lawful? Whether it is so or not, I really do not know. If I am to inquire, I must inquire into all the circumstances. I must inquire who are the most approved interpreters of the law, and the most to be respected; into the particulars of that council of Eliberis and of all other councils which, since the prevalence of Christianity, have touched upon this subject, and all the different opinions which these may have professed. As a matter of curious learning it may be a very proper employment for the leisure of idle men; but to make those the guide, in point of law, of the decisions of the courts of justice on the social and domestic relations, is to do exactly that which this act of parliament meant to prevent when it took upon itself to declare what were the prohibitions of the law of God. Whether it decided rightly or not, in a theological, or a moral, or a critical point of view, I cannot pretend to say. It has been declared by the legislature, and that declaration is binding upon all courts, that we are to look to that declaration of what the prohibited degrees are, in order to pronounce what the rule of law is to which the stat. of Wm. 4. refers. Now, I have entered into this view of the subject, because we were particularly desired, and very properly I think, not to fetter ourselves at all in the first instance by the opinions that may have prevailed afterwards upon the supposed authority either of decisions or of the general persuasion of mankind; and therefore I have found it my duty to look at the acts of parliament alone: and upon those acts of parliament, looking to their language and to their object, and to the only mode in which that object can be carried into effect, I come to an undoubting opinion that the prohibited degrees are authoritatively laid down in these two statutes, and that the marriage is therefore made void by the second section of the act of Wm. 4., referring to the then state of the law. It would, however, be highly improper to pass over the question of judicial authority, which I have for the present kept entirely distinct, but which cannot be laid aside; and upon the authority to be found on this subject, there is such a fulness and uniformity of decision as to remove in a remarkable degree all doubt from this case. The first document to which I shall refer upon this subject is the canon of 1603; not that I attribute any more legal force to these canons than Lord Hardwicke, and Lord Holt, and other great judges have done, but they are important, as showing the state of opinion upon the subject, that opinion which prevailed in fact, because it ruled the courts which had to decide upon causes matrimonial. The canon of 1603 is in these terms:—‘No person shall

shall marry within the degrees prohibited by the laws of God, and expressed in a table set forth by authority in the year of our Lord God 1563, and all marriages so made and contracted shall be adjudged incestuous and unlawful, and consequently shall be dissolved as void from the beginning, and the parties so marrying shall, by course of law, be separated; and the aforesaid table shall be in every church publicly set up and fixed at the charge of the parish.' In 1563, therefore, about twenty years after the passing of 32 H. 8., this law was promulgated in a most remarkable manner, and brought to the knowledge of every individual who could read. And then, in 1603, this was declared law, having been, in 1563, so considered and so proclaimed. Now with regard to the earlier cases, *Mann's case* and *Parson's case*, upon which much observation has been made, they are claimed as rather in favour of the plaintiff in error as if they went to show that the Court would proceed to inquire what was the law of God without reference to the act of parliament. I confess that they seem to me to leave that point very much as they find it, because when they use the expression 'the law of God' I attribute the same meaning to those words as I attribute to them when found in the act of parliament, and I think that they inquired what was within the prohibited degrees, with reference to that act of parliament, and not by proceeding to examine the Scripture, or all the various historical matters that might throw light upon the Scripture. But it was supposed that Lord Coke must have felt great doubt upon this subject in the First Institute (1) — not from anything there expressed by him, but because that passage was omitted from some editions of his work, omitted probably because King James and his council took exception to it. (2) But nothing can be more immaterial we cannot explain the history of things of that kind — we do not know how it happened — we do not know what absurd opinions such a king might have formed, or for what reasons that passage might have been expunged; but this we know, that Lord Coke in that very passage states the Act of Parliament in the sense in which I understand it, and in the most valuable of all his works, which is the Second Institute (3), writes a commentary upon the statute of 32 Hen. 8., and he never insinuates that the repeal of those former particular statutes with reference to the succession to the Crown repealed the table of prohibited degrees. On the contrary he states what the prohibited degrees are in the very words of those acts of parliament; and now we are gravely told to believe that Lord Coke really thought that there was no rule and no law defining the subject of an obligatory nature, but that every man was to go to the Scripture, and to form his own opinion upon what he found in Leviticus, or in the Gospel, or in any part of the Testament, bearing, however obliquely, upon this matter, instead of being bound by a plain and clear act of parliament, which in its very terms Lord Coke himself recites as enumerating the whole list of prohibited marriages. So much for the early authorities. Now I must admit that the treatment of the case of *Hill v. Good* does give some foundation for the argument urged on behalf of the plaintiff in error. The result of it, however, was, that a consultation was granted. And in that case of a marriage with a wife's sister, it was held that it was a marriage clearly bad, and that it was there-

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(1) 235, a.

(2) Harg. & Butl. Note, 149.

(3) P. 683.

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fore not a subject for prohibition of the Spiritual Court. Lord Chief Justice Vaughan said that the Spiritual Court must go on with the inquiry, because it belonged to them. That was a case of prohibition, and everybody who has ever had occasion to consult our old law books respecting prohibition, must be well aware that there is no head of the law subject to so much doubt and ambiguity. When it is said that the Spiritual Court is not to deal with such and such cases, that Court in some sense may be said to have the power of judging whether it can deal with them or not, and therefore must have the power to enter upon the inquiry; and this court will presume that they will act according to law, and will not interfere to prevent their acting when the law intrusts them with that jurisdiction. On the other hand it may be said, that those particular cases will be shown not to be within the jurisdiction of the Spiritual Courts, and therefore the Common Law Courts may interfere in an earlier stage to prevent those Spiritual Courts from dealing at all with that which, in the opinion of the temporal Court these Spiritual courts have no power to deal with.' Those are the opposite views, and they have prevailed upon different occasions,—sometimes the one and sometimes the other; and I agree that, whether a prohibition or a consultation was the result of the argument in a particular case, throws very little light upon the actual question. However, we have the opinion of Chief Justice Vaughan, and of the Court of Common Pleas, at full length, that the state of a wife's sister was such as to make a marriage voidable by a Court Christian, on a proper application to it. Therefore the decision of that case is entirely in conformity with the view that I take of the law; but when we come to the reasons, it is certainly a most dangerous thing to speak of a judgment which runs through twenty folio pages, and to enter into a discussion of all these reasons. I suppose that Lord Chief Justice Vaughan thought that he could put an end to all doubts by entering into a very long discussion of the matter. That was a course much more likely to raise doubts than to put an end to them. But, however, he does go directly to the chapter of Leviticus, and he forms his opinion upon that chapter, and also upon other circumstances, and an opinion which is clearly open to many of the observations made by the learned counsel for the plaintiff in error, in commenting upon his judgment. It cannot be defended in all its parts. I only know that a consultation went, and that is the important matter to know upon this occasion. In the case of *Harrison v. Burwell*, the Court granted a prohibition, because there they thought the marriage was clearly without the Levitical degrees. It was not a wife's sister whom the party married, but a wife's sister's daughter. The Court said, the objection does not reach so remote a relation, and therefore we shall issue a prohibition; and from that time to the present moment, it is admitted that all opinion and authority have gone along with the case of *Hill v. Good*, in which the Lord Chief Justice Vaughan came to that decision. It is said that we ought to set that decision aside, because we find that it is founded upon some bad reasons. I cannot at all agree with that. In so very long and so very learned a judgment, dealing with so many subjects, which are not at all before the Court, entering into the whole question of marriage among the Hebrews, and quoting the work of Selden, it is likely that mistakes would be made, which may now

be easily explained; and it would have been, in my opinion, much better that Chief Justice Vaughan should simply have said, as he might with truth, 'Here are acts of parliament which have proclaimed what the law of marriage is, and which have been acted upon ever since; we think them clear, we find them so acted upon, and by them we will abide.' I think there are two or three passages, in which he refers to the act of parliament as having decided the question itself, and if they had stood alone they would have made the judgment what I have now stated. But it is the unnecessary discussion at immense length of this question which has led to observations, upon the unsatisfactory nature of some of the arguments adduced by Lord Chief Justice Vaughan. However, from that time to the present, it is admitted that this opinion has prevailed, — not an opinion, as I think, founded in error; in which case, if I saw it clearly, I should feel myself bound to disregard the authority, to inquire into the result, and if I find it is absolutely a mistake, then I think the Court would be bound to say, as has been done in other cases, the foundation falls, and the superstructure must fall also. But this is an opinion founded upon an act of parliament, and consistent with that act of parliament, and what that act of parliament requires. Now, if that be so, what is it that the last act of parliament contemplated? Were the legislature of that day (twelve years ago) perfectly ignorant that such a course of practice had prevailed in the Spiritual Court, when they said, 'Marriages between such persons are voidable only, and now we make good those marriages which have been contracted; but those which are to be contracted we make entirely void?' Did they not know that such marriages had been held void and set aside, because within the Levitical degrees, as laid down in the statute of Hen. 8., and that authorities give a complete sanction to that course, and a distinct opinion that it was the law of the land? Marriages between persons within the prohibited degrees were then voidable only, but thereafter they were to be altogether null and void, to all intents and purposes. Are there any considerations of expediency or supposed humanity, or any other matters upon which legislation may be properly founded, which could possibly warrant a court of justice in saying that that which the act of parliament has so declared void should not be so considered? I am not insensible to those appeals which may certainly suggest a number of most painful cases with regard to unfortunate poor people whom we hear of, who may have been marrying with perfect good faith, believing that all was lawful and right, and of whom the weaker party may be abandoned by the stronger, when he finds that she has no legal claim upon him as his wife; it is a most melancholy feature in the age we live in, and a fact very much to be deplored. But if I am told of persons in a higher rank of society, connected with the church and the law, who have contracted such marriages after this act of parliament had passed (it happens that I do not know personally the name of any single individual that has done so), I must say that they ought not to have proceeded, in defiance of such an act of parliament. Particular consequences we cannot look to; the general consequences of an act of parliament we may justly look to, as affording a light for the interpretation of it; but these are all in favour of a general rule — that rule which was laid down, and has uniformly been acted upon, and which is afterwards sanctioned and set up to the fullest extent by this act of parliament. I therefore am of

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opinion, that the judgment which was given is perfectly right, because a party cannot be guilty of the crime of bigamy for contracting a second marriage, when the former one was in point of fact null, and in the very language of the law was void, to all intents and purposes. This applies only to the case of Chadwick. We have heard another case argued very much at length, upon which we think it would not be proper for us at present to give any opinion, because there will be no appeal from our judgment. In the present case, as has been intimated, our judgment, I presume, on either side, would be appealed from, and therefore we wait before we consider this as an authority for the ultimate decision of the other case. We pronounce no further opinion than what is absolutely necessary, in order to show what that opinion is upon the point raised for our decision."

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Mr. Justice COLERIDGE,—"I am entirely of the same opinion; and vastly important as this case undoubtedly is, it certainly appears to me, though I may be in error, to be remarkably clear from any serious difficulty. The question which is raised in it, and also in another case to which my lord has just alluded, has been argued in both with very remarkable learning and ability; and being so very important to the interests, and touching so nearly the very tenderest feelings of a vast number of persons, I, for one, am undoubtedly very glad that it has attracted so much zeal and industry to its discussion. But the grounds upon which my judgment will proceed are such that it will not be necessary that I should, and for reasons which will incidentally appear hereafter, I think it would be better that I should not, dwell at any very great length upon the argument. This case comes before us upon a writ of error from a court of oyer and terminer and general gaol delivery upon a charge of bigamy. The verdict has passed in favour of the prisoner, upon the ground that the first marriage proved was one that was contracted with the sister of a deceased wife, and since the passing of the 5 & 6 Wm. 4. c. 54. The defence, therefore, of the prisoner rested upon that statute; and if I reasonably and seriously believe that he is entitled to his acquittal upon the fair construction of that statute, I cannot hesitate to give him the benefit of my judgment from any consideration of the interests that may be affected, to which I may look, and to which the learned counsel for the Crown has very powerfully appealed upon different occasions in the course of his argument. I must do justice to the prisoner, whatever may be the consequences to any number of persons. Now, the 5 & 6 Wm. 4. being the statute upon which this case has turned, I confess it struck me as a somewhat remarkable circumstance,—the very little place it has had in the long and learned argument for the Crown in error. Slightly glanced at in the opening, and very generally alluded to in the course of the reply, it seemed upon the whole to be almost, I might say, studiously kept out of the observation of the Court,—and yet, in truth, the whole question turns upon it. The question is, what is the meaning of the Legislature in that short act of parliament? If we look at the preamble of that act of parliament, it begins in this way:—'Whereas, marriages between persons within the prohibited degrees are voidable only by sentence of the Ecclesiastical Court, pronounced during the lifetime of both the parties thereto; and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a

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period, and it is fitting that all marriages which may hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void, and not merely voidable; be it therefore enacted.' It therefore refers us to the decisions of the Ecclesiastical Court as to something well known. It states that marriages between persons within the prohibited degrees were only voidable during the lifetime of the parties. It points out the evil that resulted from that; and it points out also what, for the future, would be the proper alteration to be made in the law. It directs our attention, therefore, to the decisions of the Ecclesiastical Courts. It makes use of the words 'prohibited degrees' twice in that preamble, and it announces the inconvenience that had resulted from the course of practice in the Ecclesiastical Courts, and points our attention to what the law is to be for the future. Nothing, therefore, I should say, can more distinctly strike the attention of any man who has to interpret that statute, than the duty cast upon him of examining what was going on in the Ecclesiastical Courts; what suits they were that were there instituted; what marriages they were that were there held to be voidable only, upon sentence, in the lifetime of the parties. It directs our whole attention to that particular channel for the purpose of ascertaining what the meaning of the Legislature was. And then it goes on to enact, 'that all marriages which shall have been celebrated before the passing of this act, between persons being within the prohibited degrees of affinity, shall not hereafter be annulled for that cause by any sentence of the Ecclesiastical Court.' It says, therefore, marriages which had been celebrated before that time, should not therefore be annulled, assuming that they would have been liable to be set aside, but for the act of parliament passing. And it makes an exception even with regard to them, 'unless the sentence was pronounced in a suit which shall be depending at the time of the passing of this act of parliament.' So that even out of those marriages that had already been celebrated, those respecting which a suit was then pending were still left to be acted upon by the Ecclesiastical Courts. Then, that being the first provision of the act of parliament, and having relation to by-gone marriages, we come to the clause in question, which is shortly this,—'that all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity, shall be absolutely null and void to all intents and purposes whatsoever.' Now it would be unreasonable to suppose that the words 'prohibited degrees' (having in this short act of parliament occurred three times) have a different meaning in any one of these places from that which they have in the others. And it must be taken that when it speaks of future marriages within the prohibited degrees it is speaking of the same prohibited degrees as it speaks of both in the preamble, and in the enacting part of the first section. And, as I said before, it refers us distinctly for the interpretation of what those prohibited degrees are to the decisions of the Ecclesiastical Courts upon cases actually then going on. If that be so, it seems to me that it would be quite unreasonable to say that in the interpretation of this act of parliament (whatever we may think of the foundation of the decisions of the Ecclesiastical Courts) we can do otherwise than look to those decisions to know what it was that the Legislature meant. Now, suppose for example (because the argument instantly passed away from this statute to

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the 32 of Hen. 8.) that the statute of the 32 of Hen. 8. being now to come under consideration for the first time, and supposing that standing alone, and interpreting the words in that act of parliament, we should find reason to give them the meaning for which Sir Fitzroy Kelly has contended on the part of the Crown,—I say supposing all that, but supposing all other facts to remain the same—supposing the current of decisions to be what they have been—supposing the practice of the Ecclesiastical Courts to have been what it has been down to the time of 5 & 6 Wm. 4., could we in justice construe the 5 & 6 Wm. 4. at all otherwise than I have now done, because we should be disposed to put a different interpretation upon the 32 of Hen. 8.? We must look at the statute, at what it speaks for itself—at the circumstances under which it was passed—and at the evils and bad practice, if you please, of the Ecclesiastical Courts which it was pointed to; and in construing the words ‘prohibited degrees’ in this statute with reference to those decisions, to that mischief, and to that current of authorities, we must still, in spite of all that, have given the same meaning to the 5 & 6 Wm. 4. But if the 32 of Hen. 8. is to be brought into the argument, and if it be to be construed, as I think it must be, upon precisely the same principles as I have applied to the 5 & 6 Wm. 4., I apprehend, without a doubt, the very same conclusion will be arrived at. There will be no doubt that the Legislature did intend exactly what I have shown it did intend in the 5 & 6 Wm. 4. A great deal of curious historical learning has been employed in the argument, in tracing out what I may call the labyrinth of the statutes, beginning with the 25th of Hen. 8. and going down to the time of Philip and Mary, to the time of Elizabeth, I should rather say, for the purpose of seeing which of the statutes of Hen. 8. is to be considered in force, and which not. I forbear to follow the argument through that discussion, because, as it seems to me, it is not at all material, in the view which I take of this case, whether the earlier statutes, beginning with the 25th of Hen. 8. and the two statutes of the 28th of Hen. 8. are to be considered, all, or any of them, or none of them, in force at the present time. I shall use them only, and I apprehend it is a most legitimate use to make of them, as the best interpreters of the words which are used in the statute of the 32d of Hen. 8. which is confessedly in force, and to which all our attention is to be directed according to the argument. First, perhaps, it may be convenient to point out what it is that the 32d of Hen. 8. does, in terms, enact; being entitled, ‘For Marriages to stand, notwithstanding Pre-contracts.’ It may be said in substance to enact these two things:—All persons are declared to be lawful to marry who are not prohibited by God’s law to marry,—that is one proposition. And that may embrace, as it is obvious, questions far beyond that of affinity, or consanguinity, or Levitical degrees. It may relate to persons who, either from their state of body, or their state of mind, or from other circumstances, may not be lawful to marry, and all persons are declared to be lawful to marry who are not prohibited by God’s law. Then it goes on to say, that no reservation or prohibition, God’s law except, shall impeach any marriage without the Levitical degrees. And it says, ‘that no person shall be admitted in any of the Spiritual Courts to any process contrary to this act.’ I mention that last enactment only for the purpose of showing that the statute of Hen. 8., just like the statute of Wm. 4., points to the Ecclesiastical

Courts as being those in which questions of this sort are to be discussed. Now the words which we are now called upon to interpret are, 'God's law,' and 'the Levitical degrees,' and these occur in the very same branch of the same sentence, and certainly do not mean merely and simply the same thing and no more. It is assumed on the contrary that God's law may prohibit a marriage that is without the Levitical degrees, the expression being, that no reservation or prohibition, 'God's law except,' shall trouble or impeach any marriage without the Levitical degrees. There may be marriages forbidden by God's law, even without the Levitical degrees, which perhaps might lead to an explanation of some of those observations which have been made upon *Hill v. Good* in the course of the argument. There may be cases in which God's law may be a ground to trouble or impeach a marriage which is, so far as the Levitical degrees are concerned, free from impeachment or any liability to it. Now, in discussing this statute, a great deal of our attention has been turned to the 18th chapter of Leviticus. If it be necessary, in the discussion of a statute, to examine into the meaning of a passage in Scripture, painful as it is, and inconvenient, of course it must be submitted to; but I own I do hear always with pain any unnecessary critical discussion upon the language of Scripture in a Court of Common Law; I feel that we are very incompetent to enter into it; and I feel very often that it leads us into subjects which have far too much of sacredness in them to be made a matter of wrangling and discussion in a court of justice. But I must here refer to the observations which my lord has made upon this matter. We have, perhaps from necessity, in this discussion had our attention drawn simply to the present authorised version of the Bible. It is well known that that was not in existence at the time this act of parliament was passed. It was not, therefore, an act made upon the footing of that translation,—nay, the question is, whether it was on any translation. If it were a translation, whether it were a translation in the English language that the legislature referred to, we do not know. In all probability it was not a translation in the English language that was referred to when the legislature passed this law; and therefore any critical disquisition upon the mere words of the English Bible seems to me to be very much out of place, nor do I think that there is any necessity for our having recourse to it. We are not, in point of fact, examining, as we have been told so often that we were, merely and simply what God's law is—nay, we are not examining merely and simply what the Levitical degrees are; we are examining directly the statute of 32 Hen. 8. If it were perfectly clear that the legislature of that day misinterpreted the Bible—misinterpreted God's law—if their meaning were clear to us, we should be bound to act upon that misinterpretation, and not upon what we believe really to be God's law, or the prohibited degrees. If I am asked to ascertain what is the meaning of these words in this particular statute, what better means of interpreting them can I have than by looking at statutes passed about the same time *in pari materia*—statutes framed, it may have been, by the very same hands—framed, undoubtedly, with the same intention, and, as I think I shall show presently, expressing a most remarkable uniformity of opinion on the subject? It seemed to me, I own, to be a little fallacious to direct our attention to the shifting and the disgraceful tergiversation of the legislature, with regard to this or that particular mar-

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riage, for the establishing or the annulling of which great political interests were at work, and to say that on that account God's law had been pronounced in different ways in the course of those different statutes. If the statutes themselves are looked into, they are not open to that remark at all. It will be found that whenever they lay down the law generally, they lay it down with great uniformity; and be it observed, by the way, they lay it down with direct reference (for you may trace them in the acts of parliament step by step) to the Levitical degrees. Where they condescend upon particulars it will be found that that chapter was before the eye of the framer of the statute, and you have his exposition of the particular 18th verse, upon which we have had so much discussion in the course of this argument. The earliest of these statutes is that of the 25 Hen. 8., and in the 3d section of that statute it will be found that the framer takes in succession, as if he had the book of Leviticus in his hand, verse after verse. If any one be curious, and hold the Bible in his hand, and trace as I read this, it will be found that what I say is perfectly correct. We are now, be it remembered, upon the discussion of what is the meaning of 'God's law' and 'the prohibited degrees.' The act of the 32 Hen. 8. says, 'Since many inconveniences have fallen, as well within this realm as in others, by reason of marrying within the degrees of marriage prohibited by "God's law." ' Now what is the meaning of that?—'that is to say—a son to marry his mother or step-mother—a brother his sister,—a father his son's daughter, or his daughter's daughter, or a son to marry the daughter of his father, procreate and born by his step-mother, or a son to marry his aunt, being his father's or mother's sister, or to marry his uncle's wife, or a father to marry his son's wife, or a brother to marry his brother's wife, or any man to marry his wife's daughter, or his wife's son's daughter, or his wife's daughter's daughter, or his wife's sister.' Every one of the preceding steps to this you will find corresponds with the verse in Leviticus, declaring the illegality of it, and the wife's sister is the one that corresponds with the 18th verse, the verse in question, 'which marriages' it goes on to say, 'albeit they be plainly prohibited and detested by the laws of God'—there again using the term 'the laws of God'—'yet nevertheless sometimes may have proceeded.' Then it goes on after reciting all these in the 3d section; to declare them in the 4th section all to be unlawful marriages for the future. That is the 25th of Hen. 8., and is a clear and specific declaration of the legislature upon the subject. Then the 28th of Hen. 8. c. 7. to be found in the appendix, to the statutes at large has exactly the same repetition, step after step, of every one of those degrees ending with the wife's sister, only with the circumstance added, which was thought material (I need not go into that), with a view to that particular act of parliament, of making carnal knowledge of the first wife a necessary step to the illegality of the second marriage. That is the only distinction, I think, between the two; and it speaks of them again as being plainly prohibited and detested by the laws of God, and declares them for the future to be unlawful marriages. Then we come to an act passed in the same year (the 28 Hen. 8. c. 16.), which is material in this respect, that although it does not go through the Levitical degrees, step by step, it refers to that former act of parliament, and says that, 'All marriages had and solemnised within this realm, or in any other of the king's dominions, before the 3d day of November, in the 26th year of the king's most gracious reign, whereof there

is no divorce or separation had by the ecclesiastical laws of this realm, and which marriages be not prohibited by God's laws, limited and declared in the act made in this present parliament for the establishment of the king's succession,' to which I have just referred. It was upon these words, it will be remembered, that the argument was founded, that by the mention of this 28 Hen. 8. c. 7. in this act of parliament, it must be taken to be revived till the repeal of this 16th chapter by a later act. All these acts of parliament having been passed, in the 32d of Hen. 8., four years after the last of them we have an act of parliament which makes use of the words 'God's law,' without explanation, and introduces the term 'Levitical degrees.' Can it be doubted that by the first expression here used was meant the same law spoken of in the three former acts, and that by the latter were meant those very degrees which are the Levitical degrees, enumerated step by step in two of these former acts of parliament? The necessary reference to those acts, if we had been now discussing the statute of Hen. 8. for the first time, would therefore have led us to the conclusion that the right interpretation of that act of parliament was that of which the prisoner has had the benefit in the Court below. But from the time of Hen. 8. it is argued, that for a short period the authorities and the great text-writers construed it as the counsel for the crown contends that it ought to be construed, by reference simply to what his interpretation of God's law is, and so as to make this marriage valid. The cases cited by him were very few—one or two only, and I seek no further to make a remark upon them than to say that it does so happen that in each of those cases consultation was awarded. I do not wish at all to weaken the effect of the observations made upon those cases as to the ground upon which those consultations were awarded. Let it be supposed, if you please, that it was upon some technical ground, and that it left the first decision of the case unreversed. Let the counsel for the crown have the full benefit of these one or two decisions. But, at the same time, Sir Fitzroy Kelly pressed into the service the great name of my Lord Coke. I think my Lord Denman has given the most satisfactory answer to that observation. How does it stand? Here is a report by him of *Parson's case* in the First Institute.(1) It is said that that was withdrawn, and withdrawn by the influence of the Court, in subsequent editions, and that it did not re-appear till a later one, and that after his lifetime. But we have that fact, and a most important one, which my lord has referred to, that in the Second Institute of my Lord Coke (a work written at a later period) there is a formal exposition upon this very statute of Hen. 8.(2) He says, 'that for the better understanding of it, the Levitical degrees are necessary to be set down with certainty;' and then he says, 'It is to be understood that by the 18th chapter of Leviticus, not only degrees of kindred and consanguinity, but degrees of affinity and alliance, do let matrimony, which may best be illustrated and expressed in this manner.' Then in the margin he says, 'See these degrees truly set down in the statute of the 25 Hen. 8. c. 22. and 28 Hen. 8. c. 7.' which I have already referred to. I do not know whether I am authorised in saying that these marginal observations are Lord Coke's, but they are certainly of no little weight; but in the text itself I find 'a man may not marry his brother's wife, or his wife's sister,' set down in express terms; so that it is a little too much

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(1) Fo. 235, a.

(2) P. 683.

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to say that Lord Coke's authority is to be taken on the part of the crown in this case in the face of that distinct declaration by him in his *Second Institute*. Then the authorities pass on to the two cases that are to be found in Vaughan's Reports. The case of *Hill v. Good* has had a great many observations made upon it. My lord has conceded that it is difficult to stand to or affirm some of the arguments in that case; and he has given reasons why it may be that, in the course of a long judgment, parts of the reasoning may be found to be incorrect, and yet the judgment itself not the less to be sustained. With deference, I am not quite sure that when that long judgment came to be thoroughly examined from beginning to end, it might be found open in those parts to the observations that have been made. There is nothing more easy than to select in the course of a judgment of thirty or forty pages propositions which appear, taken in an isolated way, to be open to observation; and yet, perhaps, if the whole case were fairly considered, some explanation and solution might be found of the apparent incorrectness of those parts. But suffice it to say, that from that time, by the admission of every man—indeed, it is the contention that it is entirely upon the authority of that case of *Hill v. Good*—all the courts, temporal and ecclesiastical (the Ecclesiastical Courts having, by our constitution, the original judgment in cases of this sort), have been guided; it is conceded that, for about two hundred years, there has been a uniform course of decision in support of the judgment of *Hill v. Good*. Now, when we strip this case of all the advantages that eloquence and argument can give it, and when we lay the matter bare, and consider that we are only here discussing whether a man, who has been acquitted upon an exposition of the statute of the 5 & 6 Wm. 4., which is in accordance with the decision of all courts, temporal and ecclesiastical, for two hundred years, is or is not to have the benefit of his acquittal, is it not a little too much to ask this Court (only, be it observed, an intermediate Court of Error, the ultimate decision of this case being, it is stated, to be made in the Court above)—is it not a little too much for us to be asked to reverse at once this whole current of decisions, and to take away from the prisoner, James Chadwick, the verdict which he has already obtained? I do not mean to express (indeed, the whole course of my argument shows that) any doubt whatever, that in *Hill v. Good*, the right interpretation was put upon the statute; but if my opinion were less strong than it is, I should still consider it my duty, sitting where I now do, to express the opinion that I have done, and to say that I think the judgment of this Court ought to be for the defendant in error."

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wick (in error)*.

Mr. Justice WIGHTMAN, — "When this case was before me in the court below, I did not mean by the judgment which I then gave to pledge myself to any definite opinion, as I knew that it was intended that the facts found by the jury should be made the subject of a special verdict, with a view to the question being considered by the Court of Error, and that it was only necessary that a judgment should be given then as a foundation for the ulterior proceedings. I gave that judgment which at the time I thought right, and which, after careful attention to the arguments on both sides urged before the court, I do not find sufficient reason to alter. The argument upon this most important question was properly commenced by Sir Fitzroy Kelly, on the part of the plaintiff in error, by a reference to the terms of the statute

of the 5 & 6 Wm. 4. c. 54., upon the effect of which this case depends, and by inquiring what the statute meant by the words 'prohibited degrees.' If this case merely raised the abstract question, whether a deceased wife's sister were within the degrees prohibited by the Levitical law, or, by inference, by the statute of the 32d of Hen. 8. c. 83., I might find more difficulty in coming to a satisfactory conclusion, especially after this argument and the critical examination which the terms of this Levitical law and of the statute have undergone, than when the question is, as it is, what are the prohibited degrees referred to in the 5 & 6 of Wm. 4. By the first section of that statute it is enacted, "that all marriages which shall have been celebrated before the passing of this act, between persons being within the prohibited degrees of affinity, shall not hereafter be annulled for that cause by any sentence of the Ecclesiastical Court, unless pronounced in a suit which shall be depending at the time of the passing of this act;" and there is a proviso, that 'nothing hereinbefore enacted shall affect marriages between persons being within the prohibited degrees of consanguinity,' drawing a distinction between the case of marriages between persons related by affinity and those related by consanguinity. And by the second it is enacted 'that all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity, shall be absolutely null and void to all intents and purposes whatsoever.' The statute itself does not define the prohibited degrees, and the question therefore is, what do those words mean as used in it? On the part of the prosecution it is said, that 'the prohibited degrees' are those which are prohibited by some statute, and that the only statute unrepealed which shows what 'the prohibited degrees' are, is the 32d of Hen. 8. c. 38., by which it is enacted, 'that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees;' and then it is contended for the prosecution, that marrying a deceased wife's sister is neither prohibited by the law of God, nor is it within the terms of the Levitical degrees. In considering, however, the meaning and intention of the legislature in 5 & 6 Wm. 4. c. 54., it is necessary to look somewhat closely to the professed object, as well as the language of the legislature. The title is 'An Act to render certain marriages valid, and to alter the law with respect to certain voidable marriages.' The recital is—'Whereas marriages between persons within the prohibited degrees are voidable only by sentence of the Ecclesiastical Court, pronounced during the lifetime of both the parties thereto, and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity, should remain unsettled during so long a period, and it is fitting that all marriages which may hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void, and not merely voidable.' The prohibited degrees are mentioned both in the preamble and in the enacting part of the statute, without definition apparently, as already known. The preamble states that marriages between persons within the prohibited degrees were voidable only by sentence of the Ecclesiastical Court. The statute then would appear as being intended to apply to those marriages which were voidable only in the Ecclesiastical Court, by reason of their being within the prohibited degrees, and which for the future, instead of being voidable only upon such suit in

MARRIAGE.

Judgment of
Mr. Justice
Wightman in
*Reg. v. Chad-
wick* (in error)

MARRIAGE.

Judgment of
Mr. Justice
Wightman in
*Reg. v. Chad-
wick* (in error).

those courts, should be absolutely void. Upon reference to the law as administered in those courts, appearing by a long series of decisions, too well known to make it at all necessary specifically to refer to them,—it appears, that the marriage of a man with the sister of his deceased wife was voidable because such marriages were, in those courts, held to be within the prohibited degrees. At the time the statute of the 5 & 6 Wm. 4. was passed, marriages incestuous because within the prohibited degrees could only be avoided by sentence within the lifetime of the parties, pronounced in the Ecclesiastical Court. Among those which were voidable, by sentence pronounced in the Ecclesiastical Court, because within the prohibited degrees, was the marriage of a man with his deceased wife's sister. And I do not think it necessary to enquire whether, in the Ecclesiastical Court, such a marriage was held prohibited by the Levitical law, the statute law, or the common law, or by all of those laws. It is clear, from the unvarying current of authority, that such a marriage was voidable in the Ecclesiastical Court, as being within the prohibited degrees, but voidable only during the lives of the parties: if not avoided during their lives, it could not be questioned afterwards. This, no doubt, produced much uncertainty. An unfriendly suit might annul a marriage which the parties themselves would never have questioned, and which, after the death of the party, would have been good. If the case which is now before the court had arisen before the passing of the 5 & 6 Wm. 4., and the person had married his wife's sister, and afterwards had married another woman in the lifetime of the first wife's sister, the marriage not having been avoided in the Ecclesiastical Court, he would, in that case, have been found guilty of the offence in question,—the marriage being good, because not avoided in the Ecclesiastical Court. But if the same marriage had taken place before the passing of this statute, and the marriage with the deceased wife's sister had been annulled in the Ecclesiastical Court by sentence, because within the prohibited degrees, he would then have been acquitted because he would not have been guilty of the crime of bigamy. It seems to me that the object of the legislature by the 5 & 6 Wm. 4., was at once to make those marriages void which might have been avoided in the Ecclesiastical Court by a suit, thereby avoiding the hardship of the validity of a marriage remaining unsettled pending a suit, or whilst it was uncertain whether a suit would be instituted or not. It is, as it seems to me, a statutory avoidance at once of that which might be avoided in the Ecclesiastical Courts; and if the marriage of a man with his deceased wife's sister would have been avoided by a suit in the Ecclesiastical Court, as within the prohibited degrees, I think it is avoided now by the 5 & 6 Wm. 4. Upon this ground I think the acquittal right, and that the judgment of the court below should be affirmed."

Judgment of
Mr. Justice
ERLE in *Reg. v.
Chadwick* (in
error).

Mr. Justice ERLE,— "I am of the same opinion. The question turns upon the construction of the statute of the 5 & 6 Wm. 4.; and according to the ordinary rules of construction, I am of opinion that the marriage in question was intended to be comprised within the prohibited degrees mentioned in that statute. The reasons for that opinion have been already so fully assigned by the learned Judges who have preceded me, that I feel that I can add nothing."

PRIVILEGES AND RESTRAINTS OF THE CLERGY.

Page 1008. after line 29. insert

The foregoing opinion of Lord Denman supports the previous judgment of Sir Herbert Jenner Fust (1) in the same case, and which was as follows:—“This evidence appears to me quite sufficient to establish the facts that Mr. Shore, the party proceeded against, did, after the revocation of his license by the bishop of the diocese, and after a monition to abstain, officiate in this chapel; that he did perform divine offices on two Sundays, by reading prayers, and by preaching, though it is not proved that he administered the Sacrament. The question then arises, whether these acts do not constitute an ecclesiastical offence? I think it can hardly be contended that the reading of the service of the church is not an offence by the common law of the land, after the revocation of the license given to him as a minister of the Church of England to officiate in this chapel, *pro hac vice*, as a church, after a full knowledge of the revocation of the license, and of the measures taken against him by the bishop. It was said by the learned counsel for Mr. Shore, that he did no more than his duty, as according to the Rubric of the Book of Common Prayer, every priest of the Church of England is bound every day to read the form of prayer, publicly or privately, and that Mr. Shore, as a minister of the Church of England, in doing so in such a place, committed no offence. This is the first time I ever heard such an interpretation put upon the words of the rubric. It is right and proper, no doubt, that a minister in holy orders of the Church of England should read the prayers in the proper discharge of the public services, or if not, privately; but to say that he has a right to go to a place of this description—a building which had been severed from that church, and read the prayers there, is neither more nor less than to say that any and every clergyman (for it applies to every clergyman) may read the services daily in public, if he please, anywhere; this is a proposition to which I cannot assent. It was said, that it has not been specifically proved that there was a congregation present, or that the reading of the service was in public. What is necessary to constitute a congregation has not been very strictly defined; but it has been commonly considered that ‘where two or three are gathered together’ there is a sufficient number to constitute a congregation. By ‘publicly reading,’ I understand a reading to those who are present in a church or chapel. That strangers were admitted into this chapel appears from the evidence of Field, Huxham, and Gould; the two latter, as strangers, attended the service. I say then, that Mr. Shore did publicly read the prayers to those present in the chapel;—that this was not a reading in a private house, within the meaning of the 71st canon, as contended by Dr. Twiss. It was not the intention of the canon that any place, not consecrated or allowed by law, should be considered a private house; by ‘private house’ is meant a dwelling-house, where a family reside. I am well satisfied that this chapel was not a private chapel. It is clear from the evidence in the cause, that the chapel was open to any one who thought fit to attend the services. It appears then to me that so much of the charge against Mr. Shore has been established as proves that this gentleman publicly read prayers according to the Book of Common Prayer, on two separate occasions, and preached a sermon on one,

PRIVILEGES
AND RES-
TRAINTS OF
CLERGY.

Judgment of
Sir Herbert
Jenner Fust
Barnes v. St.
(Clerk).

(1) Robertson, 395. An appeal from this judgment to the judicial committee of the privy council was dismissed by that tribunal.

**PRIVILEGES
AND RE-
STRAINTS OF THE
CLERGY.**

**Judgment of
Sir Herbert
Jenner Fust in
Barnes v. Shore
(Clerk).**

though there is not sufficient proof that he administered the Sacrament. It was, however, contended in argument that, because the offence charged consists of an aggregate of three or four offences, and all have not been proved, the offence charged fails. I should like to have had some authority in this court for the assertion that, unless all the offences charged be proved, the party is entitled to be dismissed from the whole of the charge. I am of opinion that there is no authority upon which such a position can be maintained, and I have no doubt I could find cases over and over again, in which, where only one part of the charge has been made out, the party has been pronounced guilty. The case of *Hutchins v. Denziloe* (1), referred to, was a proceeding under a statute: where there are different offences subjecting the party to different degrees of punishment. The case of *Titchmarsh v. Chapman* (2) was a proceeding under a particular canon for not reading the burial service: the canon requires that convenient notice should have been given to the clergyman, which was not proved, and without that proof no offence is committed.

"I am of opinion that quite sufficient is proved against Mr. Shore to render him liable to ecclesiastical censure and punishment. When the case came originally before the court, the prayer at the conclusion of the articles was, that he should be admonished to abstain from performing ecclesiastical duties or divine offices in the chapel in question, be canonically punished according to the exigency of the law, and be condemned in the costs. As I understand, the prayer, now made to the court, is not to the same effect; but I confess, I am not prepared to go beyond that which is a canonical punishment; for however vexatiously Mr. Shore may have conducted himself here, and elsewhere, I do not consider that I can take such conduct into the account. He is not called on to answer for the offence of seceding from the church; for such an offence there must be other proceedings, in order to procure additional punishment; nor do I think it by any means clear that, under the circumstances of this case, I can refer to the protest, which was overruled, or to the allegation of Mr. Shore, which was rejected; though, had that allegation been admitted, and the proof thereof failed, I might have taken a different course, for I do not know that the court is bound by the prayer; it might be in itself illegal. On a consideration of the whole case, I am of opinion that the proctor for the promoter has proved the articles charging Mr. Shore with having been guilty of publicly reading prayers, according to the form prescribed by the Book of Common Prayer, and of preaching in an unconsecrated chapel without a license (leaving out administering the Sacrament); that he has thereby incurred ecclesiastical censure; and that he must be admonished to refrain from offending in like manner in future. Should he be guilty of a repetition of this offence, it will be one not only against his diocesan, but against the authority of this court. Though this gentleman is at this moment a minister of the Established Church of this land, from which office he cannot of his own authority relieve himself, still I do not think I am entitled to depose him from the ministry. I content myself by pronouncing that the articles have been sufficiently proved. I admonish Mr. Shore to abstain from offending in like manner in future, in the parish of Bury Pomeroy, and in the diocese of Exeter, and elsewhere in the province of Canterbury; and I condemn him in the costs."

(1) Consist. 181.

(2) 1 Robertson, 175.

RATES (CHURCH).

Page 1189. after line 40, insert

The following is a more detailed statement of the facts in the foregoing case of *Dale v. Pollard* (1):—It appears that the plaintiff had been summoned before two justices to pay his proportion of a church rate, laid by the churchwardens with the consent of the minority of a vestry meeting, the sum being under 10*l*. The justices asked his attorney if he had any thing to say against the payment. The attorney said, that he should not dispute the validity of the rate there, but give them a written notice; and should bring an action against the justices if they enforced it. He then, before the making of the order, served the justices with a written notice that the plaintiff “protested against the church rate as unscriptural, &c., that he should not contest the validity of the rate in the ecclesiastical courts, and that he should commence actions in the courts of common law against the justices and all other persons concerned therein for all acts and proceedings connected with the rate which he should be advised were illegal.” The justices knew, at the time of the order, &c., that the plaintiff intended to dispute the right of a minority to impose a church rate:—It was held, that these facts, taken together, showed that the validity of the rate was disputed, and notice thereof given to the justices, under stat. 53 Geo. 3. c. 127. s. 7.

RATES
(CHURCH).

Dale v. Pollard.

Lord DENMAN,—“I think it not at all impossible, that the legislature in passing stat. 53 Geo. 3. c. 127. s. 7., may have intended that all rates below 10*l*. should be decided by the justices unless the party gave notice of his intention to dispute in the ecclesiastical court. But that is not the language of the act. And certainly, if it were, this difficulty would follow, that, in order to exempt himself from the jurisdiction of the justices a party must give notice of an intention to dispute in the ecclesiastical court, although perfectly aware that a prohibition would ensue. At all events, as the statute stands, the jurisdiction is taken away wherever the validity is disputed and notice thereof given to the justices. Here, we have, first, a general declaration that the party will not try the validity before the justices, and then a written notice that he will not dispute in the ecclesiastical court, but that actions will be brought. The whole, taken together, shows to my mind that his intention was to dispute, in a legal course, the validity of the rate: and it is found that the justices knew this.”

Judgment of
Lord Denman
in *Dale v. Pol-
lard.*

Mr. Justice PATTERSON,—“This is a question of fact on all the evidence as set out in the special case: namely, whether the plaintiff disputed the validity of the rate, and gave a notice ‘thereof.’ The question is not in what way or before what court he meant to dispute it. The words ‘we shall not dispute the validity of the rate’ must not be taken except in connexion with what precedes and follows, which points their meaning to a dispute before the justices only. The written notice, though not drawn up with the care which was desirable, shows upon the whole what his intention was; and it is found that the justices knew that he meant to dispute a particular question, affecting the validity of the rate.”

Judgment of
Mr. Justice
Patterson
in *Dale v. Pol-
lard.*

(1) I am indebted for it, as well as for friend Mr. T. F. Ellis.
the subjoined judgments, to my learned

**RATES
(CHURCH).**

Judgment of
Mr. Justice
Wightman
in *Dale v. Pol-
lard*.

Mr. Justice WIGHTMAN, — “The decision in *Rex v. Wrottesley* (1) was that there must be a real intention to dispute, not a mere statement of such intention. That difficulty is got over here by the statement in the case, that the justices knew that the intention was *bond fide*. The only question is, Was it an intention to dispute the validity of the rate, within the meaning of the statute? Undoubtedly the written notice is not very formal; but it is evident, upon the whole, that its meaning is, that the plaintiff intended to dispute such validity, not in the ecclesiastical court, but by prohibition if the other side attempted to try the question there, — by action, if the justices chose to issue a warrant.”

Judgment of
Mr. Justice
Erle in *Dale
v. Pollard*.

Mr. Justice ERLE, — “In *Rex v. Wrottesley* (2) there was a mere declaration of an intention to dispute the validity; no action against the justices was threatened; and the decision was, that the case should be sent back to the justices.”

Page 1210. in note 1, insert

1 Robertson, 367.

SUSPENSION.

Page 1294. after line 32, insert

In *Brookes the Younger v. Cresswell* (3), the respondent was suspended from office and benefice for a certain period, and until he produced a certificate satisfactory to the Court of his conduct during the suspension, and was also condemned in the costs; at the expiration of the period of suspension, upon the exhibition of a satisfactory certificate, the Court relaxed the suspension although the costs had not been paid.

Page 1294. in note 4, insert

Sed vide ante, *Clarke v. Heathcote* (*Clerk*), ante, 434. 1 Robertson, 577.

(1) 1 B. & Ad. 648.

(2) Ibid.

(3) 5 Notes of Cases Ecclesiastical, 544.
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CORRIGENDA.

Page 129. line 13. dele "marriages."

241. line 2. for "the same statute" read "stat. 5 & 6 Edw. 6. c. 4."

277. line 33. for "it" read "and."

404. note (1), before "E. L." insert "2."

409. line 25. after "and" insert "by s. 2."

463. line 34. for "the" read "they."

478. note (3), for "5630" read "563."

552. note (1), for "M. S." read "M. & S."

619. in side note, for "notice" read "rubric."

714. note (3), for "judgment has not yet been given, but it will appear in the Addenda, if it be delivered before the publication of this treatise," read "and the Court of Queen's Bench subsequently held, that such a contract was illegal. Vide etiam Reg. r. Chadwick (in error), 12 Jurist, 174."

878. line 7. for "clergyman" read "gentleman."

904. note (2), after "3 Add." insert "1."

933. column 2. line 13. in note, for "two" read "three."

933. column 2. after line 24. in note, insert "3. John Thornborough, born at Salisbury and educated at Magdalen College, Oxford. He was appointed to the see of Limerick, A.D. 1593, and translated thence to Bristol, 1603; holding the deanery of York by commendam, with each of those sees. Godwin (*De Præsulibus Angliæ*, p. 472.) describes him as '*Rerum politicarum potius quam theologicarum, et artis chemicæ peritia clarus.*'"

934. line 46. after "Bishop of" insert as note "1 Leon. 194. 323."

1207. line 20. after "inclusive" read "In replevin by the landowner against the rector for distraining for a rent-charge, the defendant pleaded in bar the appointment of a curate by the bishop in pursuance of stat. 1 & 2 Vict. c. 106., the refusal of the rector to pay the salary assigned to him by the bishop, the sequestration issued by the bishop thereupon, and the payment of the rent-charge to the sequestrator: it was held, that the plea in bar was bad, for not stating that the year during which the absence of the defendant occurred, was from the 1st of January to the 31st of December. Sharpe r. Bluck, 11 Jurist, 328."

1290. line 39. after "him" insert "and in Rawlins r. Ellis (16 M. & W. 173.) it was held, that a person may be arrested on a Sunday for any indictable offence."

1292. line 28. after "c. 58." insert "Bills of Exchange need not be presented to acceptors for honour, or referees, till the day following the day on which they become due, and."



